TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 134 19

JOHN SCHRIMPSCHER, SILAS SMITH, ELIZA DAVIS, AMOS CROW, ET AL., PLAINTIFFS IN ERROR,

vs.

JOHN S. STOCKTON, FRANK E. POWELL, FRANK COATSWORTH, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED NOVEMBER 11, 1899.

(17,559.)

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1 And be it remembered that on the 18th day of May, 1895, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition in error and a precipe for summons in error, together with a transcript of the record of the court of common pleas of Wyandotte county, Kansas, and which petition in error & precipe & transcript are in words & figures as follows, to wit:

2 EXHIBIT "X."

In the Supreme Court of the State of Kansas.

JOHN SCHRIMPSCHER, SILAS SMITH, ELIZA DAVIS; AMOS CROW, Annie Crow, Moses Crow, Samuel Crow, Minors, by Their Guardian and Next Friend, Annis Crow, and Isaac Peacock, James Peacock, James Armstrong, Catherine Armstrong; Service Kayrahoe, by James Armstrong, His Guardian and Next Friend; Susan Whitecrow, Jacob Whitecrow, Clara Whitecrow, Jerry Whitecrow, and Naomie Kayrahoe, Minors, by Their Guardian and Next Friend, Malinda Splitlog; Alfred Whitecrow, Jane Sarahass, Amelia Cherloe, Bracket Nail Whitetree, Lucy A. Winnie, John Barnett, Susan Whitetree, Mary Nichols, Joseph Whitecrow, John Karahoe, Margaret Pipe, Mary D. Williams, and Frank Whitetree, Eva Whitetree; Richard Splitlog, for Self and as Guardian and Next Friend of Alexander Splitlog, Ida Splitlog, Inez Splitlog, Julia Splitlog, and John L. Splitlog, Minors, and Joseph Schiffbauer, for Self and as Guardian and Next Friend of Minnie Schiffbauer, Robert Schiffbauer, and Fritz Schiffbauer, Minors, and Malinda W. Splitlog, Polly Whitecrow, Heirs-at-law of Carey Rodgers, Deceased, a Wyandotte Indian, Plaintiffs in Error,

vs.

JOHN S. STOCKTON, FRANK E. POWELL, FRANK COATSWORTH, Hiland H. Reynolds, H. N. Page, William Westerland, J. Oswald Clarke, Anglo-American Cotton Milling Company, Albert Willetts, Herman Erdman, The Gossard Investment Company, Defendants in Error.

Petition in Error.

Plaintiff- in error for their petition in error say that in a certain action then pending in the court of common pleas of Wyandotte county, wherein plaintiffs in error were plaintiffs and defendants in error were defendants, said defendants recovered a judgment against these plaintiffs; a full transcript of the proceedings in said court is hereto attached, made part hereof, and marked Exhibit X X; that in said cause the court erred as follows:

Assignment of Error.

1st. The court erred in overruling the motion for judgment on the findings of fact of plaintiffs in error.

2nd. The court erred in overruling the motion for a new trial of plaintiffs in error.

3rd. The court erred in rendering judgment on the findings for defendants in error.

Wherefore plaintiffs in error pray that said errors may be corrected and the judgment reversed and the case remanded to said court for such further proceedings as may be right and proper.

J. M. MASON,
F. E. AND J. A. SMITH,
Att'ys for Pl'ffs in Error.

The clerk will issue summons in error to def'ts in error; Junius W. Jenkins, O. L. Miller, their attorneys of record.

J. A. SMITH.

Filed May 18, 1895.

C. J. BROWN,
Clerk Sup. Court.

3 EXHIBIT "X X."

Be it remembered that in the hereinafter-entitled cause, in the hereinafter-named court, the following proceedings were had: That on the 18th day of June, 1892, plaintiffs filed their petition in words and figures as follows, to wit:

In the Court of Common Pleas of Wyandotte County, Kansas.

JOHN SCHRIMPCHER, SILAS SMITH, ELIZA DAVIS; AMOS Crow, Annie Crow, Moses Crow, Samuel Crow, Minors, by Their Guardian and Next Friend, Annis Crow, and Isaac Peacock, James Peacock, James Armstrong, Catherine Armstrong; Service Kayrahoe, Minor, by James Armstrong, His Guardian and Next Friend; Susan Whitecrow, Jacob Whitecrow, Clara Whitecrow, Jerry Whitecrow, and Naomie Kayrahoe, Minors, by Their Guardian and Next Friend, Malinda Splitlog; Alfred Whitecrow, Jane Sarahass, Amelia Cherloe, Bracket Nail Whitetree, Lucy A. Winney, John Barnett, Susan Whitetree, Mary Nichols, Joseph Whitecrow, John Kayrahoe, Margaret Pipe, Mary D. Williams, and Frank Whitetree, Eva Whitetree; Richard M. Splitlog, for Self and as Next Friend of Alexander Splitlog, Ida Splitlog, Inez Splitlog, Julia Splitlog, and John L. Splitlog, Minors, and Joseph Schiffbauer, for Self and as Guardian and Next Friend of Minnie Schiffbauer, Robert Schiffbauer, and Fritz Schiffbauer, Minors, and Malinda W. Splitlog, Polly Whitecrow, Heirs-at-law of Carey Rodgers, Deceased, a Wyandott Indian, Plaintiffs,

vs.

JOHN S. STOCKTON, FRANK E. POWELL, FRANK COATSworth, Hiland H. Reynolds, H. N. Page, William Westerland, J. Oswald Clarke, Anglo-American Cotton Milling Company, Albert Willetts, Herman Erdman, The Gossard Investment Company, Defendants.

No. 993.

Petition.

Plaintiffs are the owners in fee and entitled to the immediate possession of the following-described land, in the county of Wyandotte and State of Kansas, to wit: That part of the following-described tract of land which lies east of a north and south line drawn through said hereinafter-described tract eighty-six poles west from and parallel to the east line of —.

Commencing at the center of section 27, township 10, range 25, thence north 64 poles, thence west 160 poles, thence south 64 poles, thence east 12 poles, thence south 62 poles, thence east 148 poles, thence north 62 poles to the beginning, containing 121.35 acres, more or less.

That defendants unlawfully keep plaintiffs out of possession of said land and deny the title of said plaintiff therein. The plaintiff *saith* that the rents and profits of said land held for the last three years by defendants prior to the commencement of this action *is* of the value of $1,000.00.

Wherefore plaintiff prays for a judgment against the said defendants for the possession of said land and for damages for withholding

of said lands and the rents and profits of the same for the sum of one thousand dollars, with costs of suit and a writ of possession.

JAMES M. MASON,
Attorney for Plaintiffs.

Issue summons in above-entitled cause returnable according to law.

J. M. MASON,
Att'y-at-law.

Leave given plaintiff- to amend above petition this 30 June, 1894.

JUNIUS W. JENKINS,
Attorney for Such Defendants as Represented by Me.

STATE OF KANSAS, }
County of Wyandotte, } *ss:*

In the Court of Common Pleas of Wyandotte County, Kansas.

We do solemnly swear that the cause of action set forth in the petition hereto prefixed is just; and we do further swear that by reason of our poverty we are unable to give security for costs. Affiants are well acquainted with the condition of their coplaintiffs and make this affidavit in behalf of their coplaintiffs, as well as for themselves, and the above statement is true as to all and each of the said plaintiffs in this suit.

4

his
BRACKET x NAIL WHITETREE.
mark.
ALEX NICHOLS.

Attest: ALEX NICHOLS.

Subscribed and sworn to before me this 11th day of February, 1892.

T. P. ANDERSON,
Judge of Court of Common Pleas, Wyandotte Co., Ks.

STATE OF KANSAS, }
County of Wyandotte, } *ss:*

Received this summons this 18th day of June, 1892, at 3 o'clock p. m., and served the same in my county on the 21st day of June, 1892, by leaving a true copy of the same, with all the endorsements thereon, at the usual place of residence of each of the following-named defendants, to wit, Hiland H. Reynolds, Albert Willets, Herman Erdman, and, after diligent search, I was unable to find the following within-named defendants within my county: John S. Stockton, Frank E. Powell, Frank Coatsworth, H. N. Page, William Westerlund, J. Oswald Clarke, Anglo-American Cotton Milling Company, and The Gossard Investment Campany, on the 21st day of June, 1892.

S. S. PETERSON, *Sheriff,*
By J. S. CUMMINS, *Deputy.*

And afterwards, on July 18, 1892, defendants Albert Willetts and Herman Erdman files their answer in words and figures as follows, to wit:

In the Court of Common Pleas of Wyandotte County, State of Kansas.

JOHN SCHRIMPCHER ET AL., Plaintiff-,
vs.
JOHN S. STOCKTON ET AL. } No. 993.

Answer of Albert Willets and Herman Erdman.

The defendants Albert Willets and Herman Erdman, for their answers to the plaintiffs' petition herein, say:

1. They deny each and every statement, allegation, and averment therein contained.

2. That the plaintiff-' said cause of action, if any they have, did not accrue within three years next before the commencement of this action.

3. That the plaintiff-' said cause of action, if any they have, did not accrue within fifteen years next before the commencement of this action.

JUNIUS W. JENKINS,
Attorney for Defendants Albert Willets and Herman Erdman.

And on the 18th day of July, 1892, the defendant Hiland H. Reynolds filed his answer in words and figures as follows, to wit:

In the Court of Common Pleas of Wyandotte County, State of Kansas.

JOHN SCHRIMPCHER ET AL., Plaintiffs,
vs.
JOHN S. STOCKTON ET AL., Defendants. } No. 993.

5 *Answer of Hiland H. Reynolds.*

The defendant Hiland H. Reynolds, for his answer to the plaintiffs' petition herein, says:

1. He denies each and every statement, allegation, and averment therein contained.

2. That the plaintiffs' said cause of action, if any they have, did not accrue within three years next before the commencement of this action.

3. That the plaintiffs' said cause of action, if any they have, dod not accrue within fifteen years next before the commencement of this action.

JUNIUS W. JENKINS,
Attorney for Defendant Hiland H. Reynolds.

And thereafter, on the 26th day of September, 1892, plaintiff-filed their reply to the several answers of defendants, in words and figures as follows, to wit:

In the Court of Common Pleas of Wyandotte County, Kansas.

JOHN SCHRIMPSCHER ET AL.
vs.
JOHN S. STOCKTON ET AL. } No. 993.

In Reply to the Several Answers of Defendants.

Now comes the plaintiff- and in reply to the 2nd and 3rd counts of defendants' answers contained, setting up the three and fifteen years' statutes of limitation, respectively say—

That the ancestors of the plaintiffs from whom plaintiffs derived title be descent was an incompetent Indian and classed as such under the treaty between the United States and the Wyandotte tribe of Indians concluded the 31st day of January, 1855, and, as such incompetent, was prohibited from alienation- any interest in the lands in controversy, except only the power to lease the sale for the term of two years.

That the defendants and those under whom they claim were bound by the same prohibition, and by the paramount law of the land could acquire no further interest in said land that said ancestor could convey, namely, said leasehold interest.

That said defendants entered into occupation of said lands in subordination to the rights of said ancestor, and whatever holding defendants have had since said entry has been of the same quality and kind of possession as that under which said entry was made, and no notice has ever been brought home to plaintiffs that said holding was adverse until defendants answered in this action.

Plaintiff- therefore deny each and every allegation in defendants' 2nd and 3rd counts of defense contained.

J. M. MASON,
Attorney for Plaintiffs.

Consent is hereby given to file this reply at this time, subject to all objections except to time of filing.

Sept. 23rd, 1892.

JUNIUS W. JENKINS,
Attorney for Several of Def'ts.

And thereafter, on the 11th day of May, 1894, the cause came on for its first trial, and the court thereupon entered judgment for the defendant-, and thereupon plaintiff- demanded another trial, and thereupon the judgment was set aside and a new trial granted, the journal entry of which was in words and figures as follows, to wit:

JOHN SCHRIMPSCHER ET AL., Plaintiffs,
vs.
JOHN S. STOCKTON ET AL.
No. 993.

MAY 11, 1894.

Now, on this day, comes on to be heard the above-entitled cause, and both parties appearing by counsel, a jury being waived and a trial had by the court; and thereupon it is adjudged by the court upon such hearing that the defendants do have and recover of and from the plaintiffs the said land, with costs of suit.

And thereupon plaintiffs give notice on the journal of the court that they demand another trial, and move the court to set aside and vacate said judgment in the above-entitled cause, this 11th day of May, 1894.

6 And now, on the same day, came James M. Mason, attorney for plaintiff, and by notice and demand, spread at large upon the journal, the plaintiff demanded another trial, and thereupon the said judgment above set forth in above journal entry is by the court vacated and set aside and a new trial granted, pursuant to the provisions of section 599 on the Code of Civil Procedure.

And thereafter, on the — day of February, 1895, the following order and journal entry was made by the court, to wit:

JOHN SCHRIMPSCHER
vs.
JOHN S. STOCKTON ET AL.
No. 993.

It is agreed that a jury shall be waived and a trial had by the court, provided the court makes special findings and conclusions and, in addition thereto, accord to the parties the same rights to submit special questions to him for his special answers as they would have in case said cause were tried by a jury to submit said special questions to the jury for their special answer.

J. M. MASON AND
F. E. & J. A. SMITH,
For Plaintiffs.
J. W. JENKINS,
Attorney for Defendants.
T. P. ANDERSON,
Judge of Court of Common Pleas.

And thereafter, on the 16th day of February, 1895, the cause coming regularly on for trial and a jury being waived, the trial was had before the court, and the following findings of fact and answers to questions were made by the court, and the following judgment for the defendants entered, the journal entry of which is in words and figures as follows, to wit:

JOHN SCHRIMPSCHER ET AL., Plaintiffs,
vs.
JOHN S. STOCKTON ET AL., Defendants. } No. 993.

FEBRUARY 16, 1895.

And now, on this day, the cause came regularly on for trial and the said plaintiffs appeared in person and by James M. Mason and F. E. and J. A. Smith, their attorneys, and the defendants appeared in person and by Junius W. Jenkins, their attorney, and the said parties plaintiff- and defendants, in open court and with the consent of the court, waived a jury herein and submit this cause to the court; and the court, after hearing the evidence and the arguments of counsel for the plaintiffs and defendants and being well and fully advised in the premises, finds that the evidence herein proves the following facts, to wit:

In the Court of Common Pleas of Wyandotte County, Kansas.

JOHN SCHRIMP-CHER ET AL.
vs.
JOHN S. STOCKTON ET AL. } No. 993.

Findings of Fact Made by the Court and Answers Made by the Court at the Request of the Plaintiffs to Questions Submitted by Them.

1. Margaret C. Cherloe was a Wyandott Indian of the competent class, and as such she was given, under the treaty of 1855 with that tribe, allotment No. 42, to lands described as follows, to wit: Commencing at the southeast corner of the northwest quarter (¼) of section 27, in township 10 south, of range 25 east, thence west 160 poles, thence north 64 poles, thence east 160 poles, thence south 64 poles to the beginning, containing 64 acres of land, all in Wyandotte county, Kansas; and afterwards, on the 1st day of June, 1859, there was duly issued to her by the Government of the United States a patent conveying said land to her and to her heirs and assigns forever as an absolute and unconditional grant in fee-simple and without restriction therein as to conveyance; which patent is in words and figures as follows, to wit:

7 D. DEPARTMENT OF THE INTERIOR, W. H. W.
GENERAL LAND OFFICE, J. B. L.
WASHINGTON, D. C., *Dec.* 15, 1891.

I, Thomas H. Carter, Commissioner of the General Land Office, do hereby certify that the annexed copy of a patent, dated June 1, 1859, in favor of Margaret C. Cherloe, is a true and literal exemplification from the records of this office.

The signatures of the officers who signed the patent, of which the annexed is a literal exemplification, were omitted to be copied into the record thereof, as required by law, but section 2469, ch. XI, title XXXII, of the Revised Statutes of the United States provides that the "Commissioners of the General Land Office shall cause to be prepared and shall certify, under the seal of the office, such copies

of records, books, and papers on file in his office as may be applied for, to be used in evidence in courts of justice;" and sec. 2470, same chapter and title, provides that "literal exemplifications of any records which have been or may be granted in virtue of the preceding section shall be deemed to be of the same validity in all proceedings, whether at law or equity, wherein such exemplifications are adduced in evidence as if the names of the officers signed and countersigning the same had been fully inserted in such record."

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] THOMAS H. CARTER,
Commissioner of General Land Office.

8 (4–475.)

Wyandott reserves, competent class, A, No. 42 on plat.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, pursuant to the provisions of the 2d, 3d, and 4th articles of the treaty concluded on the 31st January, 1855, between the commissioners on the part of the United States and the Wyandott tribe of Indians, a return, bearing date 14th April, 1859, from the Commissioner of Indian Affairs, has been made to the General Land Office, embracing a transcript entitled "Wyandott reserves, competent class, Book A," designating the several tracts or parcels of land being laid down on the plat connected with said book, bearing date the 22nd February, 1859, at Wyandotte City, Kansas, and certified by the United States commissioner and the commissioner for the Wyandotts as "the plat of the subdivisions of the lands belonging to the Wyandott tribe of Indians, situated in the forks of the Missouri and Kansas rivers," exhibiting "the allotments assigned to each family and individuals adjudged by" said commissioners "to be actual members of the Wyandott nation at the date of the ratification of the treaty of January 31st, 1855, according to the laws, usages, and customs thereof, and that the lines represented" thereon "have been surveyed and marked on the ground, and the corners of the allotment established in the manner customary in the Government surveys;" and

Whereas the following allotment of land, as described in said transcript, Book A, and laid down on the plat aforesaid as No. 42, has been made to Margaret C. Cherloe (Cayundiswa), the said allotments of land being situated in what is known as the "Wyandott reserve," in Kansas, said reserve being the tract of country "situated in the fork of the Missouri and Kansas rivers, which was purchased" by the "Wyandott nation" from the "Delaware Indians," and which allotment is bounded and described as follows, to wit: Commencing at the southeast corner of the northwest quarter of section twenty-seven, in township ten south, of range twenty-five east, thence west one hundred and sixty poles, thence north sixty-

four poles, thence east one hundred and sixty poles, thence
9 south sixty-four poles to the beginning, containing sixty-four acres:

Now know ye that the United States of America, in consideration of the premises and pursuant to the provisions of the treaty aforesaid, have given and granted, and by these presents do give and grant, the tract or parcel of land above described unto the said Margaret C. Cherloe, as aforesaid, and to her heirs and assigns forever, as an absolute and unconditional grant in fee-simple:

To have and to hold the said tract or parcel of land, with the appurtenances, unto the said Margaret C. Cherloe and to her heirs and assigns forever.

In testimony whereof I, James Buchanan, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, this first day of June, in the year of our Lord one thousand eight hundred and fifty-nine, and of the Independence of the United States the eighty-third.

By the President:

JAMES BUCHANAN,
[L. S.] By G. A. B. LEONARD,
Secretary.

J. N. GRANGER,
Recorder of the General Land Office.

[Endorsed:] Mason.

10 II. After the issuance of said patent and prior to the 31st day of August, 1863, said Margaret C. Cherloe died intestate, leaving Carey Rodgers, an only grandson and next of kin, and leaving no husband or children and no father or mother.

III. On August 31st, 1863, the said Carey Rodgers made, executed, and delivered to Jesse Cooper and Mary E. Stockton the following instrument in writing, to wit:

Know all men by these presents, that I, Carey Rodgers, for myself and as grandson and only heirs-at-law of Margaret C. Cherloe, deceased, for and in consideration of one hundred and twenty-eight (128) dollars, received of Jesse Cooper and Mary E. Stockton, do hereby bargain, sell and convey unto the said Jesse Cooper and Mary E. Stockton the following-described land, tenements and hereditaments, situated in Wyandotte county, in the State of Kansas, to wit:

Commencing at the southeast corner of the northwest quarter of section twenty-seven (27) township ten, (10) south of range twenty-five (25) east: thence west 160 poles, thence north 64 poles, thence east 160 poles, thence south 64 poles, to the beginning: containing 64 acres of land.

And the grantor covenants with the grantee that he is lawfully seized in fee-simple of said lands, that he has a good right to convey the same, and that said lands are free from all incumbrances, that

the grantors shall quietly enjoy the same, and that they, and that the grantor will warrant and defend the title of said land to Jesse Cooper and Mary E. Stockton against the claims of all persons whatsoever: and I, Carey Rodgers, further covenant and agree that I *will*, when I become of lawful age, ratify this, my conveyance, and in case I should fail or refuse to do so, then and in that event I agree to refund to said Jesse Cooper and Mary E. Stockton, the full consideration of this deed, to wit: ($128.00) and twelve per cent. interest per annum, from this date, which said money and interest shall be paid to them before I have any right to receive said deed.

In witness whereof, I have hereunto set my hand and seal, this 31st day of August, A. D. 1863.

his
CAREY x ROGERS.
mark.

Signed, sealed, and delivered in presence of—
JOHN W. GREYEYES.
MAURICE SHERMAN.

STATE OF KANSAS, }
Wyandotte County, } ss:

Be it remembered that on this 31st day of August, A. D. 1863, before me, J. Stilwell Stockton, a notary public in and for said county, personally appeared Carey Rodgers, personally known to me to be the identical person who signed the foregoing deed as grantor, and the contents was made known to him and freely interpreted to him by John W. Greyeyes, after which he acknowledged that he executed said deed freely and voluntarily, for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and seal of office the day and year last aforesaid.

[SEAL.] J. STILWELL STOCKTON,
Notary Public.

Which instrument was acknowledged before J. S. Stockton, the husband of one of the grantees therein and the law partner of the other of said grantees.

IV. Carey Rodgers was a Wyandotte Indian, belonging to the incompetent class by reason of being an orphan, and under said Wyandotte treaty of 1855 there was given to him allotment No. 278, alloting to him the following lands in Wyandotte county, to wit:

Commencing at the northeast corner of southwest quarter of section 27, township 10 south of range 25 east, thence south 62 poles, thence west 148 poles, thence north 62 poles, thence east 148 poles to the place of beginning, containing 57.35 acres.

On the first day of September, 1859, a patent for said lands was issued by the Government of the United States to him and to his heirs and assigns forever; which patent is in words and figures following, to wit:

11 (4–207.)

D. DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Dec.* 15, 1891.

I, Thomas H. Carter, Commissioner of the General Land Office, do hereby certify that the annexed copy of a patent, dated September 1, 1859, in favor of Carey Rogers, is a true and literal exemplification from the records of this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] THOMAS H. CARTER,
Commissioner of General Land Office.

Wyandott reserves, incompetent class, B No. 278 on plat.

To all to whom these presents shall come, Greeting:

Whereas, pursuant to the provisions of the 2d, 3d, and 4th articles of the treaty concluded on the 31st January, 1855, between the commissioners on the part of the United States and the Wyandott tribe of Indians, a return, bearing date 14th April, 1859, from the Commissioner of Indian Affairs has been made to the General Land Office, embracing a transcript entitled "Wyandott reserves, incompetent class, Book "B," designating the several tracts or parcels of land awarded to the heads of families and to individuals of the said tribe, the said tracts or parcels of land being laid down on the plat connected with said book, bearing date the 22nd February, 1859, at Wyandotte City, Kansas, and certified by the United States commissioner and the commissioners for the Wyandotts as the "plat of the subdivisions of the lands belonging to the Wyandott tribe of Indians, situated in the forks of the Missouri and Kansas rivers," exhibiting "the allotments assigned to each family and individual adjudged by" said commissioners "to be actual members of the Wyandott nation at the date of the ratification of the treaty of January 31st, 1855, according to the laws, usages, and customs thereof, and that the lines represented" thereon "have been surveyed and marked on the ground and the corners of the allotments established in the manner customary in the Government surveys;" and

Whereas the following allotment of land, as described in said transcript, Book B, and laid down on the plat aforesaid as No. 278, has been made to Carey Rodgers (male), the said allotment of land situated in what is known as the "Wyandott reserves," in Kansas, said reserve being the tract of country "situated in the fork of the Missouri and Kansas rivers, which was purchased" by the "Wyandott nation" from the "Delaware Indians," and which allotment is bounded and described as follows, to wit:

Commencing at the northeast corner of the southwest quarter of section twenty-seven, in township ten south of range twenty-five east,

thence south sixty-two poles, thence west one hundred and forty-eight poles, thence north sixty-two poles, thence east one hundred and forty-eight poles to the beginning, containing fifty-seven
12 acres and thirty-five hundredths of an acre.

Now know ye that the United States of America, in consideration of the premises and pursuant to the provisions of the treaty aforesaid, have given and granted and by these presents do give and grant the tract or parcel of land above described unto the said Carey Rodgers and to his heirs and assigns forever, with the condition "that the said tract shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior for the time being, and with the further and express condition, as specified in the fourth article of the treaty with the Wyandotts of the 31st January, 1855, that the lands are not to be sold or alienated for a period of five years:

To have and to hold the said tract or parcel of land, with the appurtenances, unto the said Carey Rodgers and to his heirs and assigns forever, with the conditions aforesaid.

In testimony whereof I, James Buchanan, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, this first
[L. S.] day of September, in the year of our Lord one thousand eight hundred and fifty-nine, and of the Independence of the United States the eighty-fourth.

By the President:

JAMES BUCHANAN,
By G. A. B. LEONARD, *Secretary.*

J. N. GRANGER,
Recorder of the General Land Office.

13 V. On the 15th day of November, 1864, the said Carey Rodgers made, executed, and delivered an instrument of writing to Jesse Cooper and Mary E. Stockton; which instrument of writing is in words and figures as follows, to wit:

Know all men by these presents that I, Carey Rodgers (male), for and in consideration of ($228), do hereby grant, bargain, and sell unto Jesse Cooper and Mary E. Stockton the following real estate situated in Wyandotte county and described as follows:

Commencing at the northeast corner of the southwest quarter of section twenty-seven (27), township 10 S., R. 25, thence south 62 poles; thence west 148 poles; thence north 62 poles; thence east 148 poles to the beginning, containing 57.35 acres of land, and the grantor covenants with the grantees that he is seized in fee-simple of said land; that he has good right to sell the same; that they are free from all incumbrance, and that he will warrant and defend the title in said land unto the said Jesse Cooper and Mary E. Stockton against the claims of all persons.

Witness my hand and revenue stamps this 15th day of November, 1864.

his
CAREY x ROGERS (*Male*).
mark.

In presence of—
WILLIAM JOHNSON.
J. S. STOCKTON.

STATE OF KANSAS, }
Wyandotte County, } *ss:*

Be it remembered on this 15th day of November, 1864, before me, J. Stilwell Stockton, a notary public in and for the said county of Wyandotte, personally appeared Carey Rogers (male), personally known to me to be the identical person who signed and executed the above deed as grantor, and after the contents of said deed *was* by me fully explained and made known to him he acknowledged that he signed and executed said deed freely and voluntarily for the uses and purposes therein mentioned.

Witness my hand and official seal the date last aforesaid.

[SEAL.] J. STILWELL STOCKTON,
Notary Public.

Recorded November 16th, A. D. 1894, at 10 a. m.

JAMES A. CRUISE,
Register of Deeds.

The acknowledgement of said instrument was taken before J. S. Stockton, as notary public, who was at the time the husband of one of the grantees and the law partner of the other.

VI. On the 25th day of February, 1869, by a partition deed of that date by Jesse Cooper and his wife and Mary E. Stockton and her husband, there was conveyed to said Mary E. Stockton the land sued for in this action and described in the petition.

VII. Said Carey Rogers died intestate between the first and ninth days of December, 1867.

VIII. On April the 4th, 1877, Lucy A. Cherloe made, executed, and delivered to Byron Judd and instrument of writing, of which the following, with all of the endorsements thereon, is a true copy:

This indenture made this 14th day of April, in the year of our Lord one thousand eight hundred and seventy-seven, between Lucy A. Cherloe, Jane Sarahess, Margaret Pipe, Eliza Splitlog, John R. Barnett, Theresa Whitecrow and Isaac Peacock, heirs of Carey Rogers, deceased, an orphan Wyandotte Indian, under the treaty of 1855, of the first part and Byron Judd, of the county of Wyandotte and State of Kansas, of the second part,

Witnesseth, that the said party of the first part, in consideration of the sum of one hundred and seventy-five dollars to them duly paid, have sold, and by these presents do grant, bargain, sell, and convey to the said party of the second part, his heirs and assigns, all

of the following-described lands and tenements situated in the county of Wyandotte & State of Kansas, and described as follows, to wit:

Commencing at the northeast corner of the southwest quarter of section twenty-seven (27) in township ten (10) south of range twenty-five (25) east, thence south sixty-two (62) poles, thence west one hundred and forty-eight (148) poles, thence north sixty-two (62) poles, thence east one hundred and forty-eight (148) poles to the beginning, containing fifty-seven and thirty-five one-hundre-ths (57.35) acres with the appurtenances and all estate title and interest of the said first part- therein; and the said party of the first part do
14 hereby covenant and agree that at the delivery hereof they are the lawful owners of the premises above granted, and seized of a good and indefeasible estate of inheritence therein, free and clear of all incumbrances, and that they will warrant and defend the same in the quiet and peaceable possession of the said party of the second part, his heirs and assigns forever.

In witness whereof the said party of the first part have hereunto set their hands the day and year above written.

LUCY A. CHERLOW.
her
JANE SARAHESS. x
mark.
her
MARGARET PIPE. x
mark.
her
ELIZA SPLITLOG. x
mark.
JOHN R. BARNETT.
her
THERESA WHITECROW x
mark.
her
ISAAC PEACOCK. x
mark.

Executed and delivered in presence of—
ENDSLEY JONES,
N. J. VAN ARNAM.

QUAPAW INDIAN AGENCY, *Indian Territory*, } ss:

On this fourteenth day of April, 1877, before me, a U. S. Indian agent in and for the Quapaw Indian agency, Indian Territory, came Lucy A. Cherlow, Jane Sarahess, Margaret Pipe, Eliza Splitlog, John R. Barnett, and Theresia Whitecrow and Isaac Peacock, to me personally known to be the same persons who executed the foregoing instrument, and duly acknowledged the execution of the same.

And I further certify that I made known to the grantors the contents of the said deed, and explained to them the purport and meaning thereof, and that they freely acknowledged the signing,

sealing, and execution thereof, and *was* satisfied and contented with the consideration paid ther-for, and that they executed the said deed and made the acknowledgement of the same without any circumvention or undue persuasion of the grantee or any other person or persons whomsoever.

Witness my hand the day and year aforesaid as such Indian agent.

H. W. JONES,
U. S. Ind'n Agent.

DEPART. OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS, *June 23rd*, 1877.

The within deed to Byron Judd from Lucy A. Cherlow, Jane Sarahess, Margaret Pipe, Eliza Splitlog, John R. Barnett, Theresa Whitecrow, and Isaac Peacock, heirs of Carey Rogers, a deceased Wyandotte Indian, is respectfully submitted to the honorable Secretary of the Interior for his approval.

I. L. SMITH,
Commissioner.

DEPART. OF THE INTERIOR, *June 25th*, 1877.

The within deed is hereby approved.

A. BELL,
Acting Secretary.

QUAPAW AGENCY, *Indian Territory*, } ss:

I, W. H. Jones, U. S. Ind'*d* agent in and for the above agency, do hereby certify that the sum named in the accompanying deed of Lucy A. Cherlow, Jane Sarahess, Margaret Pipe, Eliza Splitlog, John R. Barnett, and Theresa Whitecrow and Isaac Peacock, heirs of Carey Rogers, deceased, an orphan Wyandotte Indian, under the treaty of 1855, to Byron Judd, was paid to grantors in lawful money of the United States, and that said grantors are the sole and only heirs of Carey Rogers.

That said grantors are capable of taking care of and properly
15 managing their property, and that the consideration, one hundred and seventy-five ($175.00) dollars, is a full and fair price for the land intended to be conveyed.

Witness my hand this 28th day of May, 1877.

W. H. JONES,
U. S. Ind'n Agent.

Entered on transfer record August 22nd, 1877.
D. R. EMMONS, *Co. Clerk.*

Recorded August 22nd, 1877, at 5¾ o'clock p. m.
JAMES S. CLARK,
Register of Deeds.

IX. On the 27th day of September, 1877, Byron Judd and wife made, executed, and delivered to Mary E. Stockton their certain deed,

in writing, by which deed they conveyed all of their right, title, and interest in and to the following-described lands:

Commencing at the northeast corner of the southwest quarter of section 27, in township 10 south of range 25 east, thence south 62 poles, thence west 86 poles, thence north 62 poles, thence east 86 poles to beginning, containing 33.25 acres, being that portion of the land described in said allotment No. 278, sued for in this action; which deed contains the usual covenants of general warranty.

X. That on the 30th day of January, 1885, Mary E. Stockton, by a warranty deed of that date, describing the lands sued for herein, conveyed to John S. Stockton, one of the defendants, all of the interest which she had in said lands.

XI. On the 10th day of February, 1888, John S. Stockton and wife conveyed, by warranty deed of that date, all their interest in that portion of the land in suit to Jay Coatsworth and Hiland H. Reynolds, defendants, described as follows, to wit:

Commencing at a point 25 and $\frac{80}{100}$ poles west of the center of section twenty-seven (27), township ten (10), range twenty-five (25) east, in Wyandotte county, Kansas, thence west 60 and $\frac{20}{100}$ poles, thence south 62 poles, thence east 60 and $\frac{20}{100}$ poles, thence north 62 poles to the beginning containing 23 and $\frac{25}{100}$ acres.

And no conveyance has been made by said Coatsworth and Reynolds since said last-mentioned date.

XII. On the 28th day of January, 1888, said John S. Stockton and wife, by warranty deed of that date, conveyed all their title and interest to Frank E. Powell, defendant, to that portion of the land sued for described as follows, to wit:

Commencing at the center of section 27, township 10 south, range 25 east, thence south 62 poles, thence west 25 and $\frac{80}{100}$ poles, thence north 62 poles, thence east 25 and $\frac{80}{100}$ poles to the beginning, containing ten (10) acres of land in Wyandotte county, Kansas, and no conveyance of said described land has been made by said Powell since said last date.

XIII. Immediately after the execution of said deed from said Carey Rogers to Jesse Cooper and Mary E. Stockton, of date August 31st, 1863, and November 15, 1864, said grantees took possesion of all the land described in said deeds under claim of title and ownership by virtue of said deeds, and made permanent improvements thereon, and they and their grantees have had and held open, peaceable, quiet, undisturbed, actual, notorious, exclusive, and adverse possession of all the said lands, except as shown in findings number 15, claiming title thereto ever since the dates of said deeds, and have paid all taxes, cleared said lands of timber, and cultivated the same be tenants.

XIV. The defendants and their grantors acted in good faith in making the purchase of said lands and in taking the deeds thereto of date Aug. 31st, 1863, and Nov. 15, 1864, April 14th, 1877.

16 XV. On the first of March, 1891, there was no building or residence upon the property in controversy, the residence which had been upon the same having been destroyed by fire. The land in controversy was not cultivated that year by the defendants,

except a portion—some 15 or 20 acres—in the northwest corner thereof, which was leased in writing from the defendants, upon the north half of the land in controversy, one James M. Mason, claiming to represent the plaintiff as their agent and attorney, made a lease in writing, on the first day of March, 1891, to Jay Ikler and Adam Berlin to the land in controversy in this action, and by virtue thereof said Ikler and Berlin executed leases to certain other persons to certain portions of said tract, and said Jay Ikler and Adam Berlin and their subtenants, during the spring of 1891, plowed and planted about 35 acres of said land; that after the same was planted there was a rise in the river and a portion of this land was overflowed, so that very little crops *was* raised during the year. Subsequent to the overflow and late in the summer Adam Berlin sowed millet, and raised a crop thereof, upon about ten acres; also one Davis sowed some millet, but there was, for some reason, no result therefrom, and it is disputed whether Davis cultivated what he did under the plaintiffs or defendants; he probably, at different times, verbally recognized both parties as his landlord, but no person received rent from him.

All that Davis cultivated, as well as a portion of that cultivated by the other persons who occupied under the lease made by Mr. Mason, was on that portion of the land that was leased by defendants to A. M. Willetts. Neither Mason or any tenant claiming through him under the plaintiffs occupied or cultivated any portion of the said land at any time, except as above stated.

In 1892 one person, claiming under the plaintiffs, attempted to plow thereon, but was prevented by the defendants.

XVI. All of the deeds mentioned in these findings were duly recorded in the office of the register of deeds of Wyandotte county, Kansas, promptly after their execution.

In accordance with the stipulation herein filed, the plaintiffs herein, by their attorneys, J. M. Mason and F. E. & J. A. Smith, submit to the court for answer the following special questions:

Question 1. Was Carey Rogers an incompetant Wyandotte Indian, under the Wyandotte treaty of 1855?

Answer. Yes.

Question 2. If the above question is answered in the affirmative, state whether Carey Rogers belonged to the third classification of Wyandotte treaty of 1855, of idiots, insane, and orphans.

Answer. Yes.

Question 3. Was Carey Rogers the next of kin of Margaret Cherloe?

Answer. Yes.

Question 4. Was Margaret C. Cherloe the allotte- and patentee of the following-described land, to wit: Commencing at the S. E. corner of the N. W. ¼ of section 27, town 10 south of range 25, in Wyandotte county, Kansas, thence west 86 poles, thence north 64 poles, thence east 86 poles, thence south 64 poles to the beginning, being the east 86 poles of allotment No. 42, competent class, under the Wyandotte Indian treaty of 1855, and called in this suit Stockton tract?

Answer. Yes.

Question 5. Was Carey Rogers the grandson of Margaret Cherloe?

Answer. Yes.

Question 6. Was Margaret Cherloe a Wyandotte Indian?

Answer. Yes.

Question 7. If the question is answered in the affirmative, state whether she belonged to that classification of Wyandotte treaty of 1855 known as competants.

Answer. Yes.

17 Question 8. Was Carey Rogers the allottee and patentee of the following-described lands from the United States, to wit: Commencing at the N. E. corner of the S. W. ¼ of section 27, town 10 south of range 25, in Wyandotte county, Kansas, thence south 62 poles, thence west 86 poles, thence north 62 poles, thence east 86 poles to the beginning, and containing — acres, more or less, being the east 86 poles of allotment number 278, incompetent class, under the Wyandotte treaty of 1855?

Answer. Yes.

Question 9. What was the date of the patent for allotment 278?

(Question withdrawn.)

Question 10. What was the date of the patent of allotment 42?

(Question withdrawn.)

Question 11. Was the instrument purporting to be a conveyance dated August 31st, 1863, recorded in Book F, page 413, Sept. 2, 1863, by and from Carey Rogers to Jesse Cooper and Mary E. Stockton, for allotment 42, ever approved by the Secretary of the Interior, or other officer authorized to approve the same?

Answer. No.

Question 12. Was the instrument purporting to be a conveyance dated November 15, 1864, and recorded November 16, 1864, in Book H, page 250, from Carey Rogers to Jesse Cooper and Mary E. Stockton, for allotment 278, ever approved by the President of the United States, or other officer authorized to approve the same?

Answer. No.

Question 13. Was J. Stillwell Stockton, on August 31st, 1863, and November 15, 1864, the husband of Mary E. Stockton?

Answer. Yes.

Question 14. Was J. Stillwell Stockton, on August 31st, 1863, and November 15, 1864, the business partner of Jesse Cooper?

Answer. He was the law partner.

Question 15. Before whom were the deeds mentioned in questions 11 and 12 acknowledged?

Answer. J. Stillwell Stockton.

Question 16. Did Jesse Cooper and Mary E. Stockton enter upon the land in controversy under the deeds mentioned in questions 11 and 12?

Answer. Yes.

Question 17. If question 16 is answered in the affirmative, state

when said Jesse Cooper and Mary E. Stockton entered into the possession thereof.

Answer. Shortly after the date of the deed.

Question 18. Has J. S. Stockton, defendant herein, been out of the State of Kansas at any time since the title to the land in controversy has been claimed by him? If so, state how long, and where.

Answer. Yes; he resided out of the State from March, 1888, to August, 1894, but has been in the State during said times frequently, and at other times he has been out of the State occasionally when he resided therein.

Question 19. How old was Carey Rogers in August, 1863?

(Question withdrawn.)

Question 20. How old was Carey Rogers in November, 1864?

Answer. Eighteen.

Question 21. How old was Carey Rogers when he died?

Answer. Twenty-one.

Question 22. When did Carey Rogers die?

Answer. About the first of December, 1867.

18 Question 23. Was the land in controversy not tilled or tilled in 1881?

Answer. Very little, if any, was tilled that year.

Question 24. Was the land in controversy not tilled or tilled during the years 1885 and 1886 or either of them?

Answer. Some of the land was cultivated in 1885, but very little, if any, was cultivated in 1886.

Questions 26 and 27 withdrawn.

Question 28. Did Stockton and Cooper enter into the possession of the land in controversy under the written intrument from Carey Rogers and dated August 31st, 1863, and November 15, 1864?

Answer. Yes.

Question 29. Did ever Stockton or Cooper or their grantees offer to deliver up the possession of the land in controversy to the heirs of Carey Rogers?

Answer. No.

Question 30. Did Carey Rogers sign said written instrument by writing his name or making his mark?

Answer. Yes; by making his mark.

Question 31. At the time of the commencement of this suit, did the defendants in this cause still hold possession of the land in controversy under the written instrument from Carey Rogers to Cooper and Stockton?

Answer. Yes; together with the subsequent deed made to Byron Judd mentioned in the finding of fact number 8.

Question 32. Who are the sole surviving next of kin, following the male line, of Carey Rogers, deceased?

Answer. Frank Whitetree, Bracket N. Whitetree, Mary Nichols, Silas Smith, Jr., and Mary D. Williams.

Question 33. Were the grantors in the deed to Byron Judd dated

April 14th, 1877, the next of kin of Carey Rogers following the male line?

Answer. No.

Question 34. Did Carey Rogers leave either wife or children?

Answer. No.

Question 35. Has Mr. Coatsworth been a resident of this State since he claimed an interest in this land?

Answer. The proof does not show where the Coatsworth who is a defendant in this action lives or has lived.

Question 36. Has Mr. Powell been a resident of this State since he has claimed an interest in this land?

Answer. The evidence does not show.

And thereupon the court makes the following conclusions of law, to wit:

Conclusions of Law.

1st. The plaintiffs are not entitled to any relief in this action.

2nd. That the defendants are entitled to a judgment for their costs herein expended.

T. P. ANDERSON,
Judge of the Court of Common Pleas.

It is therefore ordered, adjudged, and decreed by the court that the plaintiffs take nothing by their suit and that the defendants recover of the plaintiffs the costs in this behalf expended, now taxed at $91.55, for which let execution issue.

19 And thereafter, on the 18th day of February, 1895, plaintiffs filed their motion for a judgment in their favor upon the special findings of fact made by the court; which motion was in words and figures as follows, to wit:

In the Court of Common Pleas of Wyandotte County, Kansas.

JOHN SCHRIMPSCHER ET AL.
vs.
JOHN S. STOCKTON ET AL. } No. 993.

Now comes the plaintiff- and moves the court for a judgment in their favor on the special findings of fact by the court, notwithstanding the adverse conclusions of law.

JAMES M. MASON,
Att'y for Plaintiffs.

And thereafter, on the 18th day of February, 1895, plaintiff- filed their motion for a new trial in words and figures as follows, to wit:

STATE OF KANSAS, } ss:
County of Wyandotte, }

In the Common Pleas Court for the County of Wyandotte, in the State of Kansas.

JOHN SCHRIMPSCHER ET AL., Plaintiffs, }
against } No. 993.
JOHN S. STOCKTON ET AL., Defendants. }

Now come the plaintiffs and move the court for a new trial in the above-entitled cause for the following reasons, to wit:

Irregularity in the proceedings of the court and prevailing party—abuse of discretion by which the plaintiff- *was* prevented from having a fair trial.

Misconduct of the prevailing party.

Accident and surprise, which ordinary prudence could not have guarded against.

Findings appearing to have been given under the influence of passion and prejudice.

The verdict-report decision is not sustained by sufficient evidence and is contrary to law.

Newly discovered evidence material to said plaintiffs which could not, with reasonable diligence, have been discovered and produced at the trial.

Error of law occurring at the trial and excepted to at the time by said plaintiffs.

NOTE.—Affidavits and other evidence will be used on the hearing of said motion.

JAMES M. MASON,
Attorney for said Plaintiffs.

And afterwards said motions for a judgment and motion for a new trial were severally heard by the court and were severally overruled by the court and said rulings excepted to by the plaintiffs, of which the following are the journal entries, to wit:

Journal 9, page 34.

JOHN SCHRIMPSCHER ET AL., Plaintiffs, }
vs. } No. 993.
JOHN S. STOCKTON ET AL., Defendants. }

SATURDAY, *March 2nd*, 1895.

Now, on this day, this cause comes on for hearing on the motion of plaintiff- for judgment in favor of plaintiff- on the findings—plaintiffs appeared by their attorney, James M. Mason, and de-
20 fendants appeared by their attorney, Junius W. Jenkins—and the court, after hearing the argument of counsel, doth overrule said motion; to which ruling of the court the plaintiff- at the time duly excepted.

JOHN SCHRIMPSCHER ET AL., Plaintiffs,
vs.
JOHN S. STOCKTON ET AL., Defendants.

Now, on this day, this cause comes on for hearing on the motion of plaintiff- for a new trial, plaintiff- appearing by their attorneys, James M. Mason, and defendants appearing by their attorney, Junius W. Jenkins, and the court, after hearing the arguments of counsel and being well and fully advised in the premises, doth overrule said motion; to which ruling of the court plaintiff- excepted, and *is* given 90 days to make and serve a case for the supreme court; defendants given 20 days thereafter to suggest amendments; case to be settled and signed on 5 days' notice.

I, George H. Jenkins, clerk of the court of common pleas of Wyandotte county, Kansas, do hereby certify that the within and foregoing is a true and correct transcript of the proceedings had in the above-entitled cause.

[SEAL OF COURT.] GEO. H. JENKINS, *Clerk.*

Filed May 18, 1895.
C. J. BROWN,
Clerk of Sup. Court.

21 And also, on the same day, there was filed in the office of the clerk of the supreme court of the State of Kansas a bond for costs, which, with the endorsements thereon and the approval thereof, is in words and figures as follows, to wit:

In the Supreme Court of Kansas.

JOHN SCHRIMPCHER ET AL., Plaintiff- in Error,
vs.
JOHN S. STOCKTON ET AL., Defendant- in Error. } Security for Costs.

We, and each of us, enter as security for all costs which may accrue to said defendant- in error, or to the officers of this court herein; and in default of payment by said plaintiff- in error of said costs and after ten days' notice we agree that execution may issue against our property for unpaid costs.

JOHN S. RAY.

[Endorsed:] 10320. No. —. John Schrimpcher *et al. vs.* John S. Stockton *et al.* Bond for costs. Approved and filed May 18, 1895. C. J. Brown, clerk sup. court. This bond is perfectly good. F. E. & J. A. Smith, attorney- for plaintiff- in error.

22 And be it further remembered that on the 18th day of May, 1895, there was issued from the supreme court of the State of Kansas a summons in error, which, with the return of service endorsed thereon and all other endorsements, is in words & figures as follows, to wit:

23 STATE OF KANSAS, *ss:*

Supreme Court.

The State of Kansas to the sheriff of Wyandotte county, Greeting:

You are hereby commanded to notify John S. Stockton, Frank E. Powell, Frank Coatsworth, Hiland H. Reynolds, H. N. Page, William Westerland, J. Oswald Clarke, Anglo-American Cotton Milling Company, Albert Willetts, Herman Erdman, The Gossard Investment Company, defendants in error, that John Schrimpcher, Silas Smith, Eliza Davis; Amos Crow, Annie Crow, Moses Crow, Samuel Crow, minors, by their guardian and next friend, Annis Crow, and Isaac Peacock, James Peacock, James Armstrong, Catherine Armstrong; Service Kayrahoe, minor, by James Armstrong, his guardian and next friend; Susan Whitecrow, Jacob Whitecrow, Clara Whitecrow, Jerry Whitecrow, and Naomie Kayrahoe, minors, by their guardian and next friend, Malinda Splitlog; Alfred Whitecrow, Jane Sarahass, Amelia Cherlee, Bracket Nail Whitetree, Lucy A. Winney, John Barnett, Susan Whitetree, Mary Nichols, Joseph Whitecrow, John Kayrahoe, Margaret Pipe, Mary D. Williams, and Frank Whitetree, Eva Whitetree; Richard M. Splitlog, for self and as next friend of Alexander Splitlog, Ida Splitlog, Inez Splitlog, Julia Splitlog, and John L. Splitlog, minors, and Joseph Schiffbauer, for self and as guardian and next friend of Minnie Schiffbauer, Robert Schiffbauer, and Fritz Schiffbauer, minors, and Malinda W. Splitlog, Polly Whitecrow, heirs-at-law of Carey Rodgers, deceased, a Wyandotte Indian, plaintiffs in error, did, on the 18th day of May, A. D. 1895, file in the clerk's office of the supreme court of Kansas a petition in error and transcript of record or case-made, the object of which is to obtain a reversal of a certain judgment rendered by the court of common pleas sitting within and for the county of Wyandotte and State of Kansas, in an action pending before said court wherein the said plaintiffs in error were plaintiffs and the said defendants in error were defendants.

You will make due return of this summons in error on or before the 28th day of May, A. D. 1895.

Witness my hand and the seal of the supreme court affixed hereto, at my office in Topeka, this 18th day of May, A. D 1895.

C. J. BROWN,
Clerk Supreme Court,
By V. T. GRAVES, *Dep'y.*

[SEAL.]

(Endorsed:) 10320. John Schrimpscher *et al. vs.* John S. Stockton *et al.* Summons in error. Issued May 18, 1895; returnable May 28, 1895. Filed May 27, 1895. C. J. Brown, clerk sup. court. (Copy.)

STATE OF KANSAS, }
Wyandotte County, } *ss.*

Received this writ May 18th, 1895, and served the same in said county by delivering to J. W. Jenkins and O. L. Miller, attorneys of record for the within-named defendants in error, each personally,

a true copy of said summons, with all the endorsements thereon, May 20th, 1895.

S. S. PETERSON, *Sheriff*,
By C. PATTERSON, *Deputy*.

Copies	$.50
Service	.75
Total	1.25

24 And afterwards, on the 28th day of October, 1897, there was filed in the office of the clerk of the supreme court of the State of Kansas a stipulation and agreement as to the filing of briefs, which is in the words and figures *and figures* as follows, to wit:

25 In the Supreme Court of Kansas.

JOHN SCHRIMPSCHER ET AL.
vs.
JOHN S. STOCKTON ET AL. } No. 10320.

Stipulation.

It is agreed that the brief of John S. Stockton, one of the defendants in error, may be served on Oct. 27, 1897, or before that date, and any reply may be filed in ten days thereafter the same as if filed in the time provided by the rules of court.

C. S. McLANE,
Representing Stockton's Interest.
JAMES M. MASON,
Att'y for Pl'ff- in Error.

26 And also be it remembered that on the 4th day of November, A. D. 1897, the same being one of the judicial days of the regular July, A. D. 1897, term of the said supreme court of the State of Kansas, said court being in session, at its court-room, in the city of Topeka, there being present the Hon. Frank Doster, chief justice, and the Hon. William A. Johnston and the Hon. Stephen H. Allen, associate justices, and Jno. Martin, Esq., clerk of said court, the following proceeding was had and remains of record in the office of the clerk of said court, to wit:

27 *Journal Entry of Submission.*

JOHN SCHRIMPSCHER ET AL., Pl'ffs in Error,
vs.
JOHN STOCKTON ET AL., Def'ts in Error. } No. 10320.

This cause comes on to be heard on the petition in error and transcript of the record of the court of common pleas of Wyandotte county, and thereupon, after oral argument by J. A. Smith, for the plaintiffs in error, said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

28 And afterwards, on the 6th day of November, A. D. 1897, there was filed in the office of the clerk of the supreme court of the State of Kansas an affidavit of one J. A. Smith showing the value of the property in controversy, which, with the endorsements thereon, is in the words & figures as follows, to wit:

29 In the Supreme Court of the State of Kansas.

JOHN SCHRIMPSCHER ET AL., Pl'ffs in Error,
vs.
J. S. STOCKTON ET AL., Def'ts in Error. } No. 10320.

J. A. Smith, of lawful age and first duly sworn, upon his oath says that the property in controversy is of the value of more — $5,000.00 *thousand dollars*, exclusive of costs.

J. A. SMITH.

Subscribed and sworn to before me this 5th day of November, 1897.

J. M. HEWLETT,
Clerk of Court of Common Pleas,
[SEAL.] By F. L. KENNY, *Dep-ty.*

(Endorsed:) #10320. Affidavit of J. A. Smith as to value in controversy. Filed Nov. 7, 1897. Jno. Martin, clerk sup. court.

30 And afterwards, on the 9th day of December, A. D. 1897, there was filed in the office of the clerk of the supreme court of the State of Kansas a motion for further time for the filing of briefs; which motion, with the endorsements thereon, is in the words and figures as follows, to wit:

31 In the Supreme Court of the State of Kansas.

JOHN SCHRIMPSCHER ET AL., Plaintiffs in Error,
vs.
JOHN S. STOCKTON, FRANK POWELL, H. H. REYNOLDS, H. N. Page, William Westurland, J. O. *O*Clark, American Cotton Milling Co., Albert Willets, Hermann Erdmann, and Gossard Investment Co., Defendants in Error. } No. 10320.

Motion.

Come now the above-named defendants, H. H. Reynolds, Frank Coatsworth, and Hermann Erdmann, and comes also Fannie L. Coatsworth, and move the court to grant them time to file briefs in answer to the brief of the plaintiff- in error, and as grounds for said motion state the following:

That they are respectively owners of or are otherwise directly interested in the title to the land in controversy in this suit, having all derived title thereto through a common grantor, viz., John S. Stockton, the defendant above named, whose warranty of title to

some part or other of the land in dispute herein they respectively hold.

That at the trial of this case in the court below, to wit, in the district court of Wyandotte county, Kansas, these movants were represented by counsel and attorney, to wit, Junius W. Jenkins, an attorney, member of the bar of said county, who was employed by their said warrantor, John S. Stockton, and that said Jenkins continued as the attorney of record for a long time after this case was brought to this court, to wit, until the month of October, 1897, when, without the knowledge of these movants or any of them, said Stockton dismissed said attorney, Junius W. Jenkins, and failed to employ any other attorney to represent their interests in this court. and that on that account no brief in their behalf has been filed herein, and no oral argument for them made.

That the brief filed by C. S. McLane, attorney of record for said Stockton in this case, relates not to the interests in said land by them held and owned, but relates exclusively and solely to other lands embraced in the plaintiffs' petition, and by its terms expressly excludes all reference to the title of these movants' lands, notwithstanding the fact that the validity of their said titles is equally involved in this suit, and was by the decree of the lower court upheld.

That the above facts have just come to their knowledge on this 8th day of December, 1897; that they have a good and valid defense to all claims against their title, and that if granted sufficient time therefor they will file briefs in answer to the brief of the plaintiff- herein as the court may allow or direct.

DAN'L B. HENDERSON,
Attorney for Defendants Reynolds, Erdmann, Frank Coatsworth, and for Fannie L. Coatsworth.

(Endorsed:) No. 10320. In the supreme court of the State of Kansas. John Schrimpscher *et al.*, plaintiffs in error, *vs.* John S. Stockton *et al.*, defendants in error. Motion for time to file briefs. Filed Dec. 9, 1897. Jno. Martin, clerk sup. court.

32 And also, on the 9th day of December, A. D. 1897, there was filed in the office of the clerk of the supreme court of the State of Kansas the affidavit of one Fannie L. Coatsworth in support of the motion for further time to file briefs, which, with the endorsements thereon, is in the words and figures as follows, to wit:

33 In the Supreme Court of the State of Kansas.

JOHN SCHRIMPSCHER ET AL., Plaintiffs in Error,
vs.
JOHN S. STOCKTON, FRANK POWELL, H. H. REYNOLDS, H. N. Page, William Westurland, J. O. Clark, American Cotton Milling Co., Albert Willets, Hermann Erdman, and Gossard Investment Co., Defendants in Error. } No. 10320.

Affidavit in Support of Motion.

Fannie L. Coatsworth, on her oath, being duly sworn, says that she is and for three years last past has been the owner in fee of the following-described real estate in the county of Wyandotte, State of Kansas, to wit: Commencing at a point 25 and 80 one-hundredths poles west of the centre of section 27, township 10, range 25, running thence west 30 and 10 — hundredths poles, thence south 62 poles, thence east 30 and 10 — hundredths poles, thence north 62 poles to the place of beginning, containing 11.62 acres of land, more or less.

That said land is a part of the land the title and ownership of which is in dispute in the above-entitled cause.

That she acquired the title to said land through John S. Stockton, one of the defendants above named, and that the title of all the other defendants to the land in controversy herein, as affiant is informed and verily believes, is likewise derived from and through said John S. Stockton.

That during all the time the above-named suit was pending in the district court of Wyandotte county, Kansas, and for a long time thereafter, and while the same was pending, on appeal, in this court, said John S. Stockton defended not only his own interest therein, but also the interest of this affiant, and, as affiant is informed and verily believes, of all the other defendants above named.

That said Stockton employed Junius W. Jenkins, a lawyer of Kansas City, Kansas, to represent him and the other defendants in the trial of this case in the said district court of Wyandotte county, and that said Junius W. Jenkins was and remained the attorney of record in said cause until some time in the month of October, 1897, when he was dismissed from his employment herein without this affiant's knowledge, and that no one else was then employed by said Stockton or by any one else to appear in this court and represent the interests of this affiant, and that her interest in the said land has not been and is not represented at the present time in this court; but that, on the contrary, the only appearance in this court by any one representing or pretending to represent any of the above-named defendants was made by C. S. McLane, an attorney of Kansas City, who appears herein on behalf of said defendant, Stockton, alone, and whose brief, filed in this court in this case, expressly omits from its scope and discussion the land and title of this affiant.

Affiant states that no brief in this case has ever been served on her or her grantor, and that the facts above recited have only come

to her knowledge this the 8th day of December, 1897, and that she has been unable on that account to take any earlier steps for the
34 protection of her rights in the premises, and that if sufficient time be granted her by this court she will file a brief in answer to the brief filed by the plaintiff herein.

FANNIE L. COATSWORTH.

Subscribed and sworn to before me this 8th day of December, 1897.

[SEAL.] HARRY W. DURALL,
Notary Public.

Com. expires Oct. 27, 1901.

(Endorsed:) No. 10320. In the supreme court of the State of Kansas. John Schrimpscher *et al.*, plaintiff- in error, *vs.* John S. Stockton *et al.*, defendants in error. Affidavit of Fannie L. Coatsworth in support of motion. Filed Dec. 9, 1897. Jno. Martin, clerk sup. court.

35 And also be it remembered that on the 9th day of December, A. D. 1897, the same being one of the judicial days of the regular July, A. D. 1897, term of the said supreme court of the State of Kansas, said court being in session at its court-room, in the city of Topeka, there being present the Hon. Frank Doster, chief justice, and the Hon. William A. Johnston and the Hon. Stephen H. Allen, associate justices, and Jno. Martin, Esq., clerk of said court, the following proceeding was had and remains of record in the office of the clerk of said court, to wit:

36 *Journal Entry of Submission of Motion.*

JOHN SCHRIMPSCHER ET AL., Pl'ffs in Error,
vs.
JOHN S. STOCKTON ET AL., Def'ts in Error. } No. 10320.

Now comes on to be heard the motion of defendants in error for leave to file their briefs within some time fixed by the court in this case for the reasons set forth in said written motion, on file herein, and thereupon, after oral argument by Daniel B. Henderson for the motion, said motion is submitted and taken under advisement by the court.

37 And afterwards, on the 11th day of December, A. D. 1897 there was filed in the office of the clerk of the supreme court of the State of Kansas the affidavit of one H. H. Reynolds in support of the motion for time to file briefs, which, with the endorsements thereon, is in the words and figures as follows, to wit:

38 In the Supreme Court of Kansas.

JOHN SCHRIMPSCHER ET AL., Plaintiffs in Error,
vs.
JOHN S. STOCKTON ET AL., Defendants in Error.

Affidavit in Support of Motion for Time to File Briefs.

Comes now H. H. Reynolds and on his oath, being duly sworn, says that he is one of the defendants in the above-entitled cause.

That at the time of the trial of said cause in the district court of Wyandotte county he owned jointly with his codefendant Frank Coatsworth twenty-three acres of the land included in this suit, the same being a portion of the Carey Rodgers allotment N. 278.

That at the time of said trial Junius W. Jenkins, an attorney of Kansas City, Kansas, was employed by affiant's granto- and codefendant John S. Stockton to defend, and that he did defend, this affiant's interests in said suit.

Affiant further states that he was informed and believed that said Jenkins was employed by said Stockton to defend his said interest as well in the supreme court after the case had been taken there on appeal, and that he did not learn until on the 8th day of December, 1897, that said Jenkins had been dismissed from his employment in this case, and that affiant's interest was not represented in the supreme court, and that the attorney appearing in the supreme court for said Stockton represented only the land embraced in the Lucy Cherloe allotment, in which last-named allotment the defendant Stockton alone is interested.

H. H. REYNOLDS.

Subscribed and sworn to before me this 10th day of December, 1897.

My commission expires February 20, 1899.

JOHN M. PHILLIPS,
[SEAL.] *Notary Public within and for Jackson County, Missouri.*

(Endorsed:) No. 10320. In the supreme court of the State of Kansas. John Schrimpscher *et al.*, plaintiffs in error, *vs.* John S. Stockton *et al.*, def'ts in error. Affidavit of H. H. Reynolds, in support of motion. Filed Dec. 11, 1897. Jno. Martin, clerk sup. court.

39 And be it also remembered that on the 11th day of December, 1897, the same being one of the judicial days of the regular July, A. D. 1897, term of the said supreme court of the State of Kansas, said court being in session at its court-room, in the city of Topeka, there being present the Hon. Frank Doster, chief justice, and the Hon. William A. Johnston and the Hon. Stephen H. Allen, associate justices, and Jno. Martin, Esq., clerk of said court, the following proceeding was had and remains of record in the clerk's office of said court, to wit:

40 *Journal Entry of Decision.*

JOHN SCHRIMPCHER ET AL., Pl'ffs in Error,
vs.
JOHN S. STOCKTON ET AL., Def'ts in Error. } No. 10320.

This cause comes on for decision, and thereupon it is ordered and adjudged that the judgment of the court below be affirmed.

It is further ordered that the plaintiffs in error pay the costs of this case in this court, taxed at $10.75, and hereof let execution issue.

41 And be it also remembered that on the said 11th day of December, 1897, there *was* filed in the office of the clerk of the supreme court of the State of Kansas the syllabus & opinion of said court, which, with the endorsements thereon, are in words and figures as follows, to wit:

42 The following is the judgment and opinion of the highest court in the State of Kansas, the supreme court, in this case:

JOHN SCHRIMPCHER ET AL.
v.
JOHN S. STOCKTON ET AL. } No. 10320.

Indian lands—After restriction on alienation removed, title by prescription may be acquired in; after restrictions on the alienation of land patented to incompetent Wyandotte Indians were removed by the treaty of 1867, title thereto might be gained by occupancy under claim of ownership; and where, at the time the treaty took effect, the defendants were in the actual possession of such lands under void deeds from an incompetent Indian, and continued without interruption to hold such possession openly, adversely, and under claim of title until 1891, held that the statute of limitations is a complete bar to an action brought by the heirs of the incompetent Indian to recover the land.

Error from Wyandotte court of common pleas, Hon. T. P. Anderson, judge.

Opinion. Filed December 11, 1897. *Affirmed.*

J. M. Mason, for plaintiffs in error.
C. S. McLane, for defendants in error.

ALLEN, *J.:*

This was an action of ejectment brought by John Schrimpcher and more than forty others as plaintiffs, claiming to be the heirs of Carey Rodgers, deceased, a Wyandotte Indian, against John S. Stockton and ten other defendants. The plaintiff- sought to recover two tracts of land allotted to Wyandotte Indians in accordance with the treaty of 1855. One tract was conveyed by patent to Margaret

C. Cherloe. She was designated as a person belonging to the competent class, and the conveyance was absolute, with full power of disposition by herself and her heirs. The other was to Carey Rodgers, an incompetent Indian, the patent containing this condition:

"That the said tract shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior for the time being; and with the further and express condition, as specified in the fourth article of the treaty with the Wyandotts of the 31 January, 1855, that the lands are not to be sold or alienated for a period of five years."

Answers were filed by various defendants, denying the plaintiffs' title and pleading the statute of limitations. The case was tried by the court and judgment was rendered for the defendants upon special findings of fact, from which we extract so much as seems necessary to an understanding of the questions decisive of the case.

On the first of June, 1859, a patent for allotment No. 42, containing sixty-four acres of land in Wyandotte county, was issued to Margaret C. Cherloe. On the first of September, 1859, a patent for allotment No. 278, containing 57.35 acres adjoining the first-mentioned tract, was issued to Carey Rodgers. Margaret C. Cherloe died prior to the thirty-first day of August, 1863, leaving Carey Rodgers, her grandson, as her only heir. On the last-mentioned date Carey Rodgers executed and delivered to Jesse Cooper and Mary E. Stockton a deed for the tract patented to his grandmother, reciting a consideration of $128. On the 15th of November, 1864, he executed and delivered to the same parties another deed for his own allotment, reciting a consideration therefor of $228. Carey Rodgers died intestate between the first and ninth days of December, 1867; he was then twenty-one years of age. The sole surviving next of kin of Carey Rodgers, following the male line, are Frank Whitetree, Bracket N. Whitetree, Mary Nichols, Silas Smith, Jr., and Mary D. Williams, who are among the parties named as plaintiffs. Immediately after the executions of the deeds from Carey Rogers to Cooper and Stockton the grantees took possession of all land described in the deeds, and they and their grantees have held actual, open, exclusive, and adverse possession of all said lands ever since the date of said deeds, and have paid all the taxes thereon, except in the years 1891 and 1892, when there was a kind of occupancy of a part of the land by persons claiming under the plaintiffs.

Under the law in force at that time the five plaintiffs named became the heirs of Carey Rodgers. Compiled Laws 1862, ch. 80, sec. 18 and 19. By the provisions of the treaty of 1855 with the Wyandottes they were to be divided into two classes, designated as
43 competants and incompetants. The lands allotted to those reported as competant to manage their affairs were to be patented to them unconditionally in fee-simple, but as to those not competant it was provided: "The patents shall contain an express condition that the lands are not to be sold or alienated for a period of five years, and then not without the express consent of the President of the United States first being obtained, and the said patents

may be withheld by the Commissioner of Indian Affairs, so long as in his judgment their being so withheld may be made to operate beneficially upon the character and conduct of the individuals entitled to them. None of the lands to be thus assigned and patented to the Wyandotts shall be subject to taxation for a period of five years from and after the organization of the State government over the territory where they reside, and those of the incompetant classes, shall not be alienated or released for a longer period than two years, and shall be exempt from levy, sale, or forfeiture until otherwise provided by State legislation with the assent of Congress." Article 4 of treaty, 10 U. S. Statutes at Large, 1161.

In the subsequent treaty, concluded February 23rd, 1867, proclaimed on the 14th of October, 1868, it was provided as follows:

"ARTICLE 15. All restrictions upon the sales of lands assigned and patented to 'incompetant Wyandottes' under the fourth article of the treaty of one thousand eight hundred and fifty-five, shall be removed after the ratification of this treaty, but no sale of lands heretofore assigned to orphans or incompetants, shall be made under decree of any court, or otherwise, for or on account of any claim, judgment, execution or order, or for taxes until voluntarily sold by the patentee or his heirs, with the approval of the Secretary of the Interior; and, whereas, many sales of land belonging to this class have heretofore been made contrary to the spirit and intent of the treaty of one thousand eight hundred and fifty-five, it is agreed that a thorough examination and report shall be made under directions of the Secretary of the Interior, in order to ascertain the facts, relating to all such cases, and upon a full examination of such report, and hearing of the parties interested, the said Secretary may confirm the said sales, or require an additional amount to be paid, or declare such sales entirely void as the very right of the several cases may require." 15 U. S. Statutes at Large, 517.

It is clear that the deed to his own allotment made by Carey Rodgers in 1864 was absolutely void. It is also clear that the deed made by him in 1863 to his grandmother's allotment was at least voidable, for he then was a minor, if it was not absolutely void because of his belonging to those classed as incompetant under the treaty.

It does not seem necessary to enter into any nice consideration of the effect of either of the conveyances executed by Carey Rodgers while he was yet a minor. We shall assume that the conveyed no title. It appears, however, that the grantees took and retained possession under them, claiming title in fee-simple. By the treaty of 1867, ratified and proclaimed in 1868, all restrictions on voluntary alienations of land patented to incompetants were removed; as to conveyances already attempted, the Secretary of the Interior was authorized to make inquiries and confirm, modify, or set aside the sales. It does not appear in this case that any action was ever taken by him with reference to this land. The state of the case, then, at the time this treaty took effect was that the lands belonged to the heirs of Carey Rodgers and were alienable by them. The defendants were in possession, claiming a title which they did not have. This

possession remained undisturbed for more than twenty years. We perceive no reason why the statute of limitations does not bar this action. The heirs of Carey Rodgers could have maintained an action to recover the land at any time after his death. So long as the land remained inalienable no title could be gained by adverse possession. Sheldon *v.* Donohue, 40 Kan., 346; McGannon *v.* Straightlege, 32 *id.*, 524; Fredrick *v.* Gray, 12 *id.*, 518. But when the lands became taxable and subject to unrestricted alienation by Rodgers' heirs, the owners were under the same necessity of exercising vigilence in asserting their rights that rested on other owners. The lands thereafter had no different legal status from those patented to white persons. The fact that those in possession claimed under void deeds does not militate against the title gained by occupancy. Fifteen years' open, exclusive, adverse possession under claim of title bars an action by the rightful owner, even though based on no written instrument. Anderson *v.* Burnham, 52 Kan., 454; Gilmore *v.* Norton, 10 *id.*, 491; Guinn *v.* Spillman, 52 *id.*, 496.

44 The findings with reference to the absence of the defendants from the State are insufficient to bring the case within the exception of the statute.

The judgment is affirmed.

45 And afterwards, on the 23rd day of December, A. D. 1897, there was filed in the office of the clerk of the supreme court of the State of Kansas a motion for the rehearing of said cause, which, with the endorsements thereon, is in the words and figures as follows. to wit:

46 In the Supreme Court of the State of Kansas.

JOHN SCHRIMPCHER ET AL., Plaintiffs,
vs.
JOHN S. STOCKTON ET AL., Defendants. } No. 10320.

Motion for Rehearing.

Now comes the plaintiff- above named and moves the court to grant them a rehearing for the following reasons, to wit:

First. The court in its former opinion ignored the proposition of law that the entry under the void deeds of 1863 and 1864 was an entry in subordination to the title of the original owner, Carey Rodgers, and that such entry made Stockton and Cooper tenants from one period to another under authority of Smyth *vs.* Henry, 41st Federal Reporter, 706, and where the holding was in subordination at its inception it would so continue until the contrary is shown, and so did continue, under findings 16, 28, and 31, pages 20 and 21 of the Record, which findings the court has failed to notice. See Dewey *vs.* McClain, 7 Kansas, page 126; Carithers *vs.* Weaver, 7 Kansas, 110.

Wherefore plaintiffs pray for a rehearing.

JAMES M. MASON,
Att'y for Pl'ff-.
F. E. & J. A. SMITH,
Attorneys for Plaintiff-.

(Endorsed:) No. 10320. John Schrimpscher *vs.* John S. Stockton *et al.* Motion for rehearing. Filed Dec. 23, 1897. John Martin, clerk sup. court. Mason & Mason, att'ys for pl'ff-.

47 And also be it remembered that on the 1st day of February, A. D. 1898, the same being one of the judicial days of the regular January, A. D. 1898, term of the said supreme court of the State of Kansas, said court being in session at its court-room, in the city of Topeka, there being present the Hon. Frank Doster, chief justice, and the Hon. William A. Johnston and the Hon. Stephen H. Allen, associate justices, and Jno. Martin, Esq., clerk of said court, the following proceeding was had and remains of record in the office of the clerk of said court, to wit:

48 JOHN SCHRIMPSCHER ET AL., Pl'ffs in Error,
vs.
JOHN S. STOCKTON ET AL., Def'ts in Error. } No. 10320.

Now comes on for decision the petition for a rehearing of this cause, and thereupon it is ordered that said petition be denied.

49 And be it also remembered that on the 22nd day of March, 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas the affidavit of J. L. Williams; which affidavit, with the endorsements thereon, is in words and figures following, to wit:

50 In the Supreme Court of the State of Kansas.

JOHN SCHRIMPSCHER ET AL., Plaintiffs,
vs.
JOHN S. STOCKTON ET AL., Defendants. } No. 10320.

Come- now J. L. Williams, a real-estate agent of Kansas City, who, being duly sworn according to law, depose- and say-:

That *they are* well acquainted with the subject-matter in dispute in this action and with the value of real estate in that locality, and that said subject-matter in dispute consists of about sixty-seven acres of land; that the value of said subject-matter *of* dispute exceeds the sum of ten thousand ($10,000.00) dollars.

That the value of said real estate is $12,000.00, and that the northerly 34.41 acres thereof and the southerly 33.35 acres are about of equal and uniform value per acre, and that either of said tracts of land last mentioned exceed- in value the sum of five thousand ($5,000.00) dollars.

J. L. WILLIAMS.

Subscribed and sworn to before me this 5th day of December, 1898.

[SEAL.] W. H. BIGGER,
Notary Public.

My commission expires 16 February, 1899.

(Endorsed on back:) 10320. Affidavit of J. L. Williams as to value of premises in controversy. Filed March 22, 1899. Jno. Martin, clerk supreme court, by F. J. Fritch, dep.

51 And on the 22nd day of March, 1899, there was filed in the office of the clerk of the supreme court of Kansas a petition for a writ of error in said cause, which, with the allowance thereof, is in words and figures as follows, to wit:

52 In the Supreme Court of the United States.

JOHN SCHRIMPSCHER, SILAS SMITH, ELIZA DAVIS; AMOS CROW, Annie Crow, Moses Crow, and Samuel Crow, Minors, by Their Guardian and Next Friend, Annis Crow, and Isaac Peacock, James Peacock, James Armstrong, Catherine Armstrong; Service Kayrahoe, Minor, by James Armstrong, His Guardian and Next Friend; Susan Whitecrow, Jacob Whitecrow, Clara Whitecrow, Jerry Whitecrow, and Naomie Kayrahoe, Minors, by Their Guardian and Next Friend, Malinda Splitlog; Alfred Whitecrow, Jane Sarahass, Amelia Cherloe, Bracket Nail Whitetree, Lucy A. Winney, John Barnett, Susan Whitetree, Mary Nichols, Joseph Whitecrow, John Kayrahoe, Margaret Pipe, Mary D. Williams, and Frank Whitetree; Richard M. Splitlog, for Self and as Next Friend of Alexander Splitlog, Ida Splitlog, Inez Splitlog, Julia Splitlog, and John L. Splitlog, Minors, and Joseph Schiffbauer, for Self and as Guardian and Next Friend of Minnie Schiffbauer, Robert Schiffbauer, and Fritz Schiffbauer, Minors; Malinda W. Splitlog, and Polly Whitecrow, Heirs-at-law of Carey Rodgers, Deceased, a Wyandotte Indian, Plaintiffs in Error,

vs.

JOHN S. STOCKTON, FRANK E. POWELL, FRANK COATSWORTH, Hiland H. Reynolds, H. N. Page, William Westerlund, J. Oswald Clarke, Anglo-American Cotton Milling Company, Albert Willetts, Herman Erdman, The Gossard Investment Company, Defendants in Error.

Petition for a Writ of Error.

United States of America to the honorable chief justice of the State of Kansas:

Plaintiffs in error above named respectively show that on the 11th day of December, 1897, the supreme court of the State of Kansas rendered a final judgment against your petitioners in a certain cause, wherein the plaintiff in error above named were plaintiffs and the defendants in error above named were defendants, affirming the judgment of the court of common pleas of the county of Wyandotte, State of Kansas, in favor of said defendants and against your petitioners for the recovery of the following-described lands, situated in

the county of Wyandotte and State of Kansas, to wit, east 67.65 acres of —, following, to wit:

Commencing at the center of section 27, township 10, range 25, thence north 64 poles, thence west 160 poles, thence south 64 poles, thence east 12 poles, thence south 62 poles, thence east 148 poles, thence north 62 poles to the beginning, containing 121.35 acres, more or less.

Comes now the said plaintiffs in error, by James M. Mason and L. J. Mason, their attorneys, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

That by the record aforesaid it appears that the judgment and decision aforesaid was given for the said defendants in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs in error against the said defendants in error.

That said supreme court of the State of Kansas is the highest court of said State in which a decision in said suit could be had.

And your petitioners claim the right to remove said judgment and proceedings to the Supreme Court of the United States by writ of error, under section 709 of the Revised Statutes of the United States, because the title of the plaintiffs to the above-described land and their claim of title thereto was acquired and derived under treaties of the United States to and with the Wyandotte tribe of Indians, to wit:

The treaty concluded on the 31st day of January, A. D. 1855, between the commissioners on the part of the United States and said tribe of Indians, and the modification of that treaty under article 15 of the 23rd of February 1867, ratified and proclaimed by the same parties in A. D. 1868.

That the record herein presents a Federal question upon the proper construction of said treaties and the rights acquired by plaintiffs as heirs-at-law of the patentee of the United States Gov-
53 ernment under the provisions of said treaties, as is more fully shown in accompanying affidavit marked Exhibit "A," hereto attached and made a part hereof.

And the decision of said State court was directly against the validity of the said title acquired under said treaty under which plaintiffs in error claim title to said premises and directly in favor of a title gained by operation of the statutes of limitation of the State of Kansas in contravention to the proper construction of said treaties and of the paramount laws of the United States, and under which title, by operation of the said laws of Kansas, defendants in error claim, and which title plaintiffs in error aver is void and founded on a misconstruction of said treaties, as shown by the record herein, which is hereto appended and made a part of this petition for a writ of error.

J. M. MASON,
SMITH & BETTS,
Att'ys for Pl'ffs in Error.

F.

54 Let the writ of error issue as prayed for — the petition of plaintiffs in error, and it appearing to the court by the record and proofs in this case that the plaintiffs are the heirs-at-law of Carey Rodgers, deceased, an incompetent Indian under the Wyandott treaty of January 31st, 1855, and Feb'y 15th, 1867, ratified and proclaimed in 1868, and by the findings in the record in this case that Frank Whitetree, Bracket N. Whitetree, Mary Nichols, Silas Smith, Jr., and Mary D. Williams are the sole heirs-at-law and next of kin of the deceased Carey Rodgers, who died seized of the land in dispute in this action, and that the five plaintiffs last named are the only parties interested in prosecuting this action, herefore it is hereby ordered that a severance be had of said last-named plaintiffs from the others in the supreme court of Kansas, and said Frank Whitetree, Bracket N. Whitetree, Mary Nichols, Silas Smith, Jr., and Mary D. Williams are by this order of severance authorized to prosecute their separate appeal and writ of error in this cause to the Supreme Court of the United States.

Dated this 8 day of April, 1899.

FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

[Endorsed:] 10320. Petition for writ of error. Filed March 22, 1899. Jno. Martin, clerk supreme court, by F. J. Fritch, dep.

55 And also, on the 8th day of April, 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas an appeal bond in the above-entitled cause; which said bond, with the approval & endorsements, is in words and figures as follows, to wit:

56 In the Supreme Court of the United States.

JOHN SCHRIMPCHER, SILAS SMITH, ELIZA DAVIS; AMOS CROW, Annie Crow, Moses Crow, Samuel Crow, Minors, by Their Guardian and Next Friend, Annis Crow, and Isaac Peacock, James Peacock, James Armstrong, Catherine Armstrong; Service Kayrahoe, by James Armstrong, His Guardian and Next Friend; Susan Whitecrow, Jacob Whitecrow, Clara Whitecrow, Jerry Whitecrow, and Naomie Kayrahoe, Minors, by Their Guardian and Next Friend, Malinda Splitlog; Alfred Whitecrow, Jane Sarahass, Amelia Cherloe, Bracket Nail Whitetree, Lucy A. Winnie, John Barnett, Susan Whitetree, Mary Nichols, Joseph Whitecrow, John Kayrahoe, Margaret Pipe, Mary D. Williams, and Frank Whitetree, Eva Whitetree; Richard Splitlog, for Self and as Guardian and Next Friend of Alexander Splitlog, Ida Splitlog, Inez Splitlog, Julia Splitlog, and John L. Splitlog, Minors, and Joseph Schiffbauer, for Self and as Guardian and Next Friend of Minnie Schiffbauer, Robert Schiffbauer, and Fritz Schiffbauer, Minors, and Malinda W. Splitlog, Polly Whitecrow, Heirs-at-law of Carey Rodgers, Deceased, a Wyandott Indian, Plaintiffs in Error,

vs.

JOHN S. STOCKTON, FRANK E. POWELL, FRANK COATSWORTH, Hiland H. Reynolds, H. N. Page, William Westerland, J. Oswald Clarke, Anglo-American Cotton Milling Company, Albert Willetts, Herman Erdman, The Gossard Investment Company, Defendants in Error.

Know all men by these presents that we, Bracknet Nail Whitetree, Frank Whitetree, A. J. McKinney, and Thomas H. Wimpey, of Tiff City, in the county of McDonald and State of Missouri, are held and firmly bound unto —— McKenney, clerk of the Supreme Court of the United States, in the full and just sum of two hundred ($200.00) dollars, current money of the United States, to be paid to the said —— McKenney, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 3d day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at the supreme court of the State of Kansas, in a suit depending in said court between the plaintiffs and defendants above named, a judgment was rendered against the said plaintiffs, and the said plaintiffs having obtained an order allowing an appeal of said cause and writ of error to the Supreme Court of the United States, and filed a transcript of said cause from the records of said court in the office of the clerk of the Supreme Court of the United States to reverse the judgment in the aforesaid action:

Now, the condition of the above obligation is such that if the said obligors shall well and truly pay or cause to be paid to the said —— McKenney, clerk of said Supreme Court of the United States, his

heirs, executors, administrators, or assigns, all such fees as shall accrue to him, the said —— McKenney, clerk as aforesaid, and charged to the said plaintiffs in the prosecution of the said appeal or writ of error in said cause, then the above obligation to be void; otherwise to remain in full force and virtue.

his
BRACKNET NAIL x WHITETREE. [L. S.]
mark.
FRANK WHITETREE. [L. S.]
A. J. McKINNEY. [L. S.]
THOS. H. WIMPEY. [L. S.]

Witness- to mark:
SARAH WHITETREE.
DAN. HUCKINS.

57 UNITED STATES OF AMERICA.

STATE OF MISSOURI, } ss:
County of McDonald, }

A. J. McKinney and Thomas H. Wimpey, being each duly sworn, deposes and says and each for himself saith that he is worth two hundred ($200) dollars over and above all just debts, liabilities, and exemptions.

A. J. McKINNEY.
THOS. H. WIMPEY.

Subscribed and sworn to before me this 3d day of March, 1899.

[Seal of Dan. Huckins, Notary Public, McDonald County, Mo.]

DAN. HUCKINS,
Notary Public.

Commission expires Jan. 27, 1903.

The above bond and sureties thereto duly approved.

FRANK DOSTER,
Chief Justice.

[Endorsed:] 10320. Cost bond. Filed April 8, 1899. Jno. Martin, clerk sup. court, by F. J. Fritch, dep.

58 In the Supreme Court of United States.

JOHN SCRIMPCHER ET AL. }
vs.
JOHN S. STOCKTON ET AL. }

Error from supreme court of State of Kansas.

Be it remembered that on the 8th day of April, 1899, there was filed in the office of clerk of the supreme court of the State of Kansas an assignment of error which is in words & figures following, to wit:

59 In the Supreme Court of the United States of America.

JOHN SCHRIMPCHER, SILAS SMITH, ELIZA DAVIS; AMOS CROW, Annie Crow, Moses Crow, Samuel Crow, Minors, by Their Guardian and Next Friend, Annis Crow, and Isaac Peacock, James Peacock, James Armstrong, Catherine Armstrong; Service Kayrahoe, Minor, by James Armstrong, His Guardian and Next Friend; Susan Whitecrow, Jacob Whitecrow, Clara Whitecrow, Jerry Whitecrow, and Naomie Kayrahoe, Minors, by Their Guardian and Next Friend, Malinda Splitlog; Alfred Whitecrow, Jane Sarahass, Amelia Cherloe, Bracket Nail Whitetree, Lucy A. Winney, John Barnett, Susan Whitetree, Mary Nichols, Joseph Whitecrow, John Kayrahoe, Margaret Pipe, Mary D. Williams, and Frank Whitetree, Eva Whitetree; Richard M. Splitlog, for Self and as Guardian and Next Friend of Alexander Splitlog, Ida Splitlog, Inez Splitlog, Julia Splitlog, and John L. Splitlog, Minors, and Joseph Schiffbauer, for Self and as Guardian and Next Friend of Minnie Schiffbauer, Robert Schiffbauer, and Fritz Schiffbauer, Minors, and Malinda W. Splitlog, Polly Whitecrow, Heirs-at-law of Carey Rodgers, Deceased, a Wyandotte Indian, Plaintiffs in Error,

vs.

JOHN S. STOCKTON, FRANK E. POWELL, FRANK COATSWORTH, Hiland H. Reynolds, H. N. Page, William Westerlund, J. Oswald Clarke, Anglo-American Cotton Milling Company, Albert Willetts, Herman Erdman, The Gossard Investment Company, Defendants in Error.

In error.

Of the October term, in the year of our Lord one thousand eight hundred and ninety-nine.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the above-named plaintiffs in error, by their attorneys, James M. Mason and L. J. Mason, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

I. That by the record aforesaid it appears that the judgment aforesaid was given for the said defendants in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs in error against the said defendants in error (corresponding to 1st and 3rd assignments of error in the State court).

II. That the supreme court of the State erred in sustaining the trial court in the following findings, the same being the XIV finding of fact as classed by the trial court (but in view of the other findings being really more a conclusion of law than of fact), viz:

"XIV. That the defendants and their grantors acted in good faith in making the purchase of said lands (the lands in question in this suit) and in taking the deeds thereto of date Aug. 31st, 1863, and Nov. 15, 1864, April 14, 1877."

III. The supreme court of the State erred in holding that said grantees took, if anything, otherwise than as lessees of said lands in subrogation to the superior title of the Indian owner and patentee, Carey Rodgers, and his heirs, or took anything therein that could be the basis of a title by prescription or limitation in their favor, howsoever long they might hold the same under such quality of possession.

IV. The supreme court of the State erred in sustaining the trial court in its holding that the treaty between the United States and the Wyandott tribe of Indians of 1867, ratified and proclaimed in 1868, modified the restrictions of the Wyandott treaty of 1855 in regard to involuntary alienation of said lands assigned and patented or otherwise belonging to incompetent Indians under said last-named treaty.

V. That the supreme court of the State erred in holding and sustaining the trial court in holding that any State statute of limitations could take hold of said lands and interfere with the primary disposal of the soil by the United States or become the foun-
60 dation for a title by prescription in favor of defendants in error so long as the said lands remained in the said incompetent or in the heirs of the blood of said tribe, and in that way subvert the provisions of the treaties existing between the United States and said Indians against alienation by operation of law or otherwise than by voluntary sale under the provisions of the supplementary treaty of 1867–'8. See findings of trial court XIII and conclusions of law 1st and 2nd, followed by final judgment.

And the said plaintiffs in error above named, and each and all of them, pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that said plaintiffs in error may be restored to all things which they have lost by occasion of the said judgment. Witness a copy of the record hereto attached, marked Exhibit X.

JAMES M. MASON,
L. J. MASON,
Attorneys for Plaintiffs in Error.

[Endorsed:] 10320. Assignment of errors. Filed April 8, 1899. Jno. Martin, clerk sup. court, by F. J. Fritch, dep.

61 And thereafter, to wit, on the 8th day of May, A. D. 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas a writ of error in the above-entitled cause; which said writ of error was in words and figures following, to wit:

62 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the judgment of a plea which is in the said supreme court of Kansas, before you or some of you, being the highest court of law or equity of the said

State in which a decision could be had in the said suit between John Schrimpcher, Silas Smith, Eliza Davis; Amos Crow, Annie Crow, Moses Crow, Samuel Crow, minors, by their guardian and next friend, Annis Crow, and Isaac Peacock, James Peacock, James Armstrong, Catherine Armstrong; Service Kayrahoe, minor, by James Armstrong, his guardian and next friend; Susan Whitecrow, Jacob Whitecrow, Clara Whitecrow, Jerry Whitecrow, and Naomie Kayrahoe, minors, by their guardian and next friend, Malinda Splitlog; Alfred Whitecrow, Jane Sarahass, Amelia Cherloe, Bracket Nail Whitetree, Lucy A. Winney, John Barnett, Susan Whitetree, Mary Nichols, Joseph Whitecrow, John Kayrahoe, Margaret Pipe, Mary D. Williams, and Frank Whitetree, Eva Whitetree; Richard M. Splitlog, for self and as guardian and next friend of Alexander Splitlog, Ida Splitlog, Inez Splitlog, Julia Splitlog, and John L. Splitlog, minors, and Joseph Schiffbauer, for self and as guardian and next friend of Minnie Schiffbauer, Robert Schiffbauer, and Fritz Schiffbauer, minors, and Malinda W. Splitlog, Polly Whitecrow, heirs-at-law of Carey Rodgers, deceased, a Wyandotte Indian, plaintiffs in error, and John S. Stockton, Frank E. Powell, Frank Coatsworth, Hiland H. Reynolds, H. N. Page, William Westerlund, J. Oswald Clarke, Anglo-American Cotton Milling Company, Albert Willetts, Herman Erdman, The Gossard Investment Company, defendants in error, wherein was drawn in question the validity of the proceedings and authority exercised under the United States and the decision was against its validity, and wherein was drawn in question the validity of the title of the plaintiffs in error to certain land acquired and derived under a treat- between the United States and the Wyandott tribe of Indians, concluded on the 31st day of January, A. D. 1855, between the commissioners on the part of the United States and said tribe of Indians, and the modification of that treaty under article 15 of the 23rd of February, 1867, ratified and proclaimed by the same parties A. D. 1868, and by an authority thereunder exercised under the United States, and the decision was against such validity of said title and said authority, to the great damage of the plaintiffs in error above named, and each and all of them, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday in October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court, the 8th day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862. }

GEO. F. SHARITT,
Clerk of the Circuit Court of the United States for the District of Kansas.

Allowed this April 29, 1899.
FRANK DOSTER,
Chief Justice Supreme Court of Kansas.

[Endorsed:] No. 10320. John Schrimscher *et al.*, pl'ffs in error, *vs.* John S. Stockton *et al.*, def'ts in error. Writ of error. Filed May 8th, 1899. Jno. Martin, clerk supreme court. F. J. Fritch, dep.

63 And thereafter, to wit, on the 27th day of June, A. D. 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas a citation, which, with the acknowledgement of service thereof endorsed thereon and proof of service attached thereto, is in words and figures as follows, to wit:

64 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To John S. Stockton, Frank E. Powell, Frank Coatsworth, Hiland H. Reynolds, H. N. Page, William Westerlund, J. Oswald Clarke, Anglo-American Cotton Milling Company, Albert Willetts, Herman Erdman, The Gossard Investment Company, and their attorney of record, Junius W. Jenkins, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, in a certain action wherein John Schrimpscher, Silas Smith, Eliza Davis; Amos Crow, Annie Crow, Moses Crow, and Samuel Crow, minors, by their guardian and next friend, Annis Crow, and Isaac Peacock, James Peacock, James Armstrong, Catherine Armstrong; Service Kayrahoe, minor, by James Armstrong, his guardian and next friend; Susan Whitecrow, Jacob Whitecrow, Clara Whitecrow, Jerry Whitecrow, and Naomie Kayrahoe, minors, by their guardian and next friend, Malinda Splitlog; Alfred Whitecrow, Jane Sarahass, Amelia Cherloe, Bracket Nail Whitetree, Lucy A. Winney, John Barnett, Susan Whitetree, Mary Nichols, Joseph Whitecrow, John Kayrahoe, Margaret Pipe, Mary D. Williams, and Frank Whitetree, Eva Whitetree; Richard M. Splitlog, for self and as guardian and next friend of Alexander Splitlog, Ida Splitlog, Inez Splitlog, Julia Splitlog, and John L. Splitlog, minors, and Joseph Schiffbauer, for self and as guardian and next friend of Minnie Schiffbauer, Robert Schiffbauer, and Fritz Schiffbauer, minors; Malinda W. Splitlog, and Polly Whitecrow, heirs-at-law of Carey

Rodgers, deceased, a Wyandotte Indian, are plaintiffs in error and John S. Stockton, Frank E. Powell, Frank Coatsworth, Hiland H. Reynolds, H. N. Page, William Westerlund, J. Oswald Clarke, Anglo-American Cotton Milling Company, Albert Willetts, Herman Erdman, The Gossard Investment Company are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned shall not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable Frank Doster, chief justice of the supreme court of the State of Kansas, this 8th day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

Witness my hand and official signature, at Topeka, the capitol of the State of Kansas, on the 8th of May, A. D. 1899.

[Seal Supreme Court, State of Kansas.]

JNO. MARTIN,
Clerk of the Supreme Court of the State of Kansas.

65 [Endorsed:] 10320. Citation. Filed Jun- 27, 1899. Jno. Martin, clerk supreme court.

Received copy of the within June 3, 1899.

C. S. McLANE.

Filed Jun- 27, 1899.

JNO. MARTIN,
Clerk Supreme Court.

STATE OF KANSAS, } ss:
County of Wyandotte, }

James M. Mason, being duly sworn, deposes and says that he did, on the 2d day of June, 1899, duly serve the within and foregoing citation on Junius W. Jenkins, the attorney of record in this cause, within named as such, and on the 3d day of June, 1899, duly served the same on J. S. Stockton and C. S. McLane by delivering to each of above-named persons a true copy thereof.

JAMES M. MASON.

Subscribed and sworn to before me this 5th day of June, 1899. My commission expires M'ch 15th, 1903.

[Seal of W. T. Hovey, Notary Public, Wyandotte County, Ks.]

W. T. HOVEY,
Notary Public.

66 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the supreme court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the judgment of a plea which is in the said supreme court of Kansas, before you

or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John Schrimpsher, Silas Smith, Eliza Davis; Amos Crow, Annie Crow, Moses Crow, Samuel Crow, minors, by their guardian and next friend, Annis Crow, and Isaac Peacock, James Peacock, James Armstrong, Catherine Armstrong; Service Kayrahoe, minor, by James Armstrong, his guardian and next friend; Susan Whitecrow, Jacob Whitecrow, Clara Whitecrow, Jerry Whitecrow, and Naomie Kayrahoe, minors, by their guardian and next friend Malinda Splitlog; Alfred Whitecrow, Jane Sarahass, Amelia Cherloe, Bracket Nail Whitetree, Lucy A. Winney, John Barnett, Susan Whitetree, Mary Nichols, Joseph Whitecrow, John Kayrahoe, Margaret Pipe, Mary D. Williams, and Frank Whitetree, Eva Whitetree; Richard M. Splitlog, for self and as guardian and next friend of Alexander Splitlog, Ida Splitlog, Inez Splitlog, Julia Splitlog, and John L. Splitlog, minors, and Joseph Schiffbauer, for self and as guardian and next friend of Minnie Schiffbauer, Robert Schiffbauer, and Fritz Schiffbauer, minors, and Malinda W. Splitlog, Polly Whitecrow, heirs-at-law of Carey Rodgers, deceased, a Wyandotte Indian, plaintiffs in error, and John S. Stockton, Frank E. Powell, Frank Coatsworth, Hiland H. Reynolds, H. N. Page, William Westerlund, J. Oswald Clarke, Anglo-American Cotton Milling Company, Albert Willetts, Herman Erdman, The Gossard Investment Company, defendants in error, wherein was drawn in question the validity of the proceedings and authority exercised under the United States and the decision was against its validity, and wherein was drawn in question the validity of the title of the plaintiffs in error to a certain land acquired and derived under a treaty between the United States and the Wyandotte tribe of Indians, concluded on the 31st day of January, A. D. 1855, between the commissioners on the part of the United States and said tribe of Indians, and the modification of that treaty under article 15 of the 23rd of February, 1867, ratified and proclaimed by the same parties A. D. 1868, and by an authority thereunder exercised under the United States, and the decision was against such validity of said title and said authority, to the great damage of the plaintiffs in error above named, and each and all of them, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 9 day of October, 1899, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Seal of the Circuit Court of the United States, District of Kansas, 1862.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 13 day of Sept., in the year of our Lord one thousand eight hundred and ninety-nine.

GEO. F. SHARITT,
Clerk of the Circuit Court of the United States for the District of Kansas.

This writ allowed this Sept. 9, 1899.
FRANK DOSTER,
Chief Justice, Kansas.

[Endorsed:] 10320. Writ of error. Filed Sep. 15, 1899. Jno. Martin, clerk supreme court.

67 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To John S. Stockton, Frank E. Powell, Frank Coatsworth, Hiland H. Reynolds, H. N. Page, William Westerlund, J. Oswald Clarke, Anglo-American Cotton Milling Company, Albert Willetts, Herman Erdman, the Gossard Investment Company, and their attorney of record, Junius W. Jenkins, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, in a certain action wherein John Schrimpscher, Silas Smith, Eliza Davis; Amos Crow, Annie Crow, Moses Crow, and Samuel Crow, minors, by their guardian and next friend, Annis Crow, and Isaac Peacock, James Peacock, James Armstrong, Catherine Armstrong; Service Kayrahoe, minor, by James Armstrong, his guardian and next friend; Susan Whitecrow, Jacob Whitecrow, Clara Whitecrow, Jerry Whitecrow, and Naomie Kayrahoe, minors, by their guardian and next friend, Malinda Splitlog; Alfred Whitecrow, Jane Sarahass, Amelia Cherloe, Bracket Nail Whitetree, Lucy A. Winney, John Barnett, Susan Whitetree, Mary Nichols, Joseph Whitecrow, John Kayrahoe, Margaret Pipe, Mary D. Williams, and Frank Whitetree, Eva Whitetree; Richard M. Splitlog, for self and as guardian and next friend of Alexander Splitlog, Ida Splitlog, Inez Splitlog, Julia Splitlog, and John L. Splitlog, minors, and Joseph Schiffbauer, for self and as guardian and next friend of Minnie Schiffbauer, Robert Schiffbauer, and Fritz Schiffbauer, minors; Malinda W. Splitlog and Polly Whitecrow, heirs-at-law of Carey Rodgers, deceased, a Wyandotte Indian, are plaintiffs in error and John S. Stockton, Frank E. Powell, Frank Coatsworth, Hiland H. Reynolds, H. N. Page, William Westerlund, J. Oswald Clarke, Anglo-American Cotton Milling Company, Albert Willetts, Herman Erdman, The Gossard Investment Company, are defendants in error, to show cause,

if any there be, why the judgment in the said writ of error mentioned shall not be corrected and speedy justice would not be done in that behalf.

Witness the Honorable Frank Doster, chief justice of the supreme court of the State of Kansas, this 15 day of September, in the year of our Lord one thousand eight hundred and ninety-nine.

FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

Witness my hand and official signature, at Topeka, capitol of the State of Kansas, on the fifteenth day of September, 1899.

[Seal Supreme Court, State of Kansas.]

JNO. MARTIN,
Clerk of the Supreme Court of the State of Kansas.

68 [Endorsed:] 10320. Citation.

STATE OF KANSAS, } ss:
County of Wyandotte, }

James M. Mason, of lawful age, being duly sworn according to law, deposes and saith that he served a true copy of the within citation on Junius W. Jenkins and J. S. Stockton at their respective offices, in Kansas City, Kas., on the 20th day of September, 1899.

JAMES M. MASON.

Subscribed and sworn to before me this 20th day of September, 1899.

[Seal of W. T. Hovey, Notary Public, Wyandotte County, Ks.]

W. T. HOVEY,
Notary Public.

Com. expires M'ch 15, 1903.

I hereby acknowledge that a copy of the within citation was served on me this 23rd day of September, 1899.

C. S. McLANE.

I hereby acknowledge that a copy of the within citation was served on me this 23rd day of September, 1899.

HILAND H. REYNOLDS.

Served copy on Junius W. Jenkins Sept. 20, 1899.

——.

69 In the Supreme Court of the State of Kansas.

JOHN SCHRIMPSCHER ET AL., Plaintiffs in Error,
vs.
JOHN S. STOCKTON ET AL., Defendants in Error. } No. 10320.

I, John Martin, Esq., clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript of the pleadings and papers filed and of all proceedings had in the above-entitled cause, as the same remain now on file and of record in my office.

Seal Supreme Court, State of Kansas.

Witness my hand and the seal of the supreme court of the State of Kansas, hereto affixed, at my office, in the city of Topeka, this 3rd day of Oct., A. D. 1899.

JNO. MARTIN,
Clerk of the Supreme Court of the State of Kansas.

Endorsed on cover: File No., 17,559. Kansas supreme court. Term No., 154. John Schrimpscher, Silas Smith, Eliza Davis, Amos Crow, *et al.*, plaintiffs in error, *vs.* John S. Stockton, Frank E. Powell, Frank Coatsworth, *et al.* Filed November 11th, 1899.

No. 19 —

Brf. of Mason & Springer

Office Supreme Court U. S.
FILED
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JAMES H. Mc

Supreme Court of the United States

Filed Oct. 15, 1901.

OCTOBER TERM, 1901.

No. 154.

JOHN SHRIMPSHER, SILAS SMITH, ET AL., PLAINTIFFS IN ERROR,

vs.

JOHN S. STOCKTON, ET AL.

STATEMENT, ASSIGNMENT OF ERROR, AND BRIEF.

JAMES M. MASON,
CHAS H. NEARING,
Att'ys for Pff's in Error.

WM. M. SPRINGER,
of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 154.

JOHN SHRIMPSHER, SILAS SMITH, ET AL., PLAINTIFFS IN ERROR,

vs.

JOHN S. STOCKTON, ET AL.

STATEMENT, ASSIGNMENT OF ERROR, AND BRIEF.

STATEMENT.

The suit is one of ejectment, originating in the District Court of Wyandotte County, Kansas. The answers were general denials and a plea of both the three and fifteen year statute of limitation; a jury was waived and the cause submitted to the Court, sitting as a jury. Judgment was rendered for the defendant, an appeal taken to the Supreme Court of the State of Kansas, which Court affirmed the judgment of the lower Court. The cause was then brought to this Court by a writ of error. The facts are as follows: One Carey Rogers was an incompetant Wyandotte Indian, being an orphan, and was allotted, under the treaty of 1855, the land in controversy, which was conveyed to him by patent, dated September 1, 1859, which patent contained the usual clauses against alienation and subject to condition of fourth article of treaty of 1855, (pages 12-13 record.) The record also contains the patent and finding of fact pertaining to another tract of land, patented to Margaret A. Charloe, the grandmother of Carey Rogers, which subsequently descended to

him. (Page 8 record.) Settlement of this property has since been made, it is not now involved in the case.

The only property and facts now in question is that described in and pertaining to the patent of September 4, 1859, (pg. 12-13), abstract. On November 15, 1864, Carey Rogers, who was then 18 years of age, (finding of fact, question 20, pg. 20 record,) conveyed the property in question to grantors of defendants who thereafter entered into possession of the same.

This deed was never approved by the Secretary of Interior, Carey Rogers died in 1867, leaving plaintiffs Frank Whitetree, Bracket N. Whitetree, Mary Nichols, Silas Smith, Jr. and Mary D. Williams, his sole surviving next of kin following the male line. (Question 32, pg. 20, record.)

On April 4, 1877, Lucy A. Charloe, Jane Sarahess and others, executed and delivered to Byron Judd a deed to the property in question, (pg. 19 record.) On September 27, 1877, Byron Judd and wife executed deed to Mary E. Stockton who subsequently executed deed to defendant.

The court found the grantors to this deed were not the next of kin of Carey Rogers following male line question, (33 pg. 20, abstract.)

The trial court made the following finding of fact pertaining to the possession of the property in question (paragraph XIII, pg. 17, record.)

"Immediately after the execution of said deed from said Carey Rogers to Jesse Cooper and Mary E. Stockton of date August 31, 1863, (this being to property not now involved,) and November 15, 1864, said grantees took possession of all the land described in said deeds under claim of title and ownership by virtue of said deeds, and make per-

manent improvements thereon and they and their grantees have had and held open, peaceable, quite, undisturbed, actual notorious, exclusive and adverse possession of all said lands except as shown in finding no 15 claiming title thereto ever since the date of said deeds and have paid all taxes, cleared said land of timber and cultivated the same by tenants.

XV. On the first of March, 1891, there was no building or residence upon the property in controversy, the residence which had been upon the same having been destroyed by fire. The land in controversy was not cultivated that year by the defendants, except a portion, some 15 or 20 acres in the northwest corner thereof, which was leased in writing from the defendants. Upon the north half of the land in controversy, one James M. Mason, claiming to represent the plaintiff as their agent and attorney, made a lease in writing in the first day of March, 1891, to Jay Ikler and Adam Berlin to the land in controversy in this action and by virtue thereof, said Ikler and Berlin executed leases to certain other persons to certain portions of said tract and said Jay Ikler and Adam Berlin and their subtenants, during the spring of 1891 plowed and planted about 35 acres of said land, and after the same was planted, there was a rise in the river and a portion of the land was overflowed so that very little crops was raised during the year subsequent to the overflow, and late in the summer Adam Berlin sowed millet and raised a crop thereof upon about ten acres; also one Davis sowed some millet, but there was for some reason no result therefrom, and it is disputed whether Davis cultivated what he did under the plaintiffs or defendants, he probably at different times verbally

recognized both parties as his landlord, but no person received rent from him.

"All that Davis cultivated as well, as a portion of that cultivated by the other persons who occupied under the lease made by Mr. Mason, was on a portion of the land that was leased by defendants to A. M. Willetts. Neither Mason or any tenant claiming through him under the plaintiffs, occupied or cultivated any portion of said land at any time except as above stated. In 1892 one person claiming under the plaintiffs attempted to plow thereon but was prevented by the defendants.

The defendants claimed possession by virtue of the deed from Carey Rogers above referred to, also a deed to one Byron Judd, dated April 4, 1877. but the deed to Judd was not executed by the heirs of Carey Rogers (see finding of fact, question 33, pg. 20, abstract.)

"The Supreme Court of Kansas held (page 33 record) that the deed by Carey Rogers to grantees of defendant were void. By the treaty of 1867 ratified in 1868, all restrictions of voluntary alienation of land patented to incompetents were removed. As to conveyances already attempted the Secretary of the Interior was authorized to make inquiries and confirm, modify or set aside the sales. It does not appear in this case that any action was ever taken by him in reference to this land. The state of the case then, at the time this treaty took effect, was that the lands belonged to the heirs of Carey Rogers and were alienable by them. The defendants were in possession claiming a title which they did not have. This possession remained undisturbed for more than twenty years. We see no reason why the statute of limitation does not bar this action."

ASSIGNMENT OF ERRORS.

1st. The court erred in sustaining the trial court in the following finding, (the same being the XIV.) The defendants and the grantor acted in good faith in making the purchase of said lands and in taking the deeds thereto of date August 31, 1863 and November 15, 1864, April 14, 1877.

II.

The court erred in holding that the grantees of Carey Rogers took anything from such convevance upon which a title by prescription or limitation could be based.

III.

The court erred in sustaining the trial court That the treaty of 1867 modified the treaty of 1855 in regard to alienation of said land patented to incompetent Indians and applied to the property in question.

IV.

The court erred in holding the statute of limitation of the State of Kansas applied to the land in question and was a bar to this claim.

POINTS AND AUTHORITIES.

I.

Plaintiff being Indian are not subject to statute of limitation.

McGannon vs. Straightlege,	32 Kan. 524.
Sheldon vs. Donohue,	40 " 346.
O'Brien vst Bugbee,	46 " 1.
Gibson vs. Choteau,	80 U. S. 92.
Kansas Indians,	72 " 737.
Stevens vs. Smith,	77 " 321.

II.

That the deed from Carey Rogers of November 15, 1864, (pg. 13 record,) under which defend ant hold is void not having been approved by the Secretary of Interior.

III.

That said deed will not constitute sufficient color of title to enable defendants to claim adverse possession.

Gibson vs, Choteau,	13 Wall. 99.
Irvin vs. Marshall,	20 How. 558.
Gibbs vs. Gas Co.,	130 U. S. 412.
Livingston vs. The Peru Ice Co.,	9 Wend. 511.
Taylor vs. Brown,	5 Da. 343.
Zeller vs. Eckhart,	4 How. 389.
Libby vs. Clark,	118 U. S. 250.
Smythe vs. Henny,	41 Fed. Rep. 705.
Diffenback vs. Hawes,	115 U. S. 423.

III.

No additional rights accured to defendants by the death of Carey Rogers.

IV.

No title by prescription or limitation under any state statute could be acquired as against the right of the Secretary of the Interior to investigate and modify or declare void the conveyance in question; hence the state of limitation could not begin to run, if at all, until after such action by the Secretary of Interior.

Gibson vs. Choteau, 13 Wall. 99.

V.

The delay of the government in acting on the property in question is a matter for which plaintiffs are not responsible.

Gibson vs. Choteau, 13 Wall. 99.

VI.

Plaintiffs being heir of Carey Rogers inherit the property in question.

Opin. Supreme Court, Kans., page 32 record.

Complied Law Kans., 1862 Ch. 80, Sec. 18 and 19.

ARGUMENT.

I.

Will the statuute of limitation run against plaintiffs.

This depends upon their status whether they had become citizens under the treaty of 1855 or were wards of the nation, dependent upon the government for protection and support. The record is silent on that point and it must be determined by the treaties, and the rules as to presumption established by the courts.

The treaty of 1855, Art. 1 states.

"The Wyandotte Indians having become sufficiently advanced in civilization and being desirous of becoming citizens, it is hereby agreed and stipulated, that their organization, and relations with the United States, as an Indian tribe shall be dissolved and terminated, on the ratification of this agreement except so far as the further and temporary continuance of the same may be necessary in the execution of some of the stipulations herein, and from and after the date of such ratification, thesaid Wyandotte Indians, and each and every one of them, except as herein after provided, shall be deemed and are hereby declared to be citizens of the United States to all iutents and purposes, and shall be entitled to all the right, privileges, and immunities of such citizens and shall in all respect be subject to the laws of the United States and the Territory of Kansas in the same manner as other citizens of said Territory and the jurisdiction of the United States. and of said Territory shall be extended over the Wyandotte Country in the same manner as other parts of said Territory. But such of the said Indians as may so desire and make application accordingly to the commissioner herein provided for, shall be ex-

empt from the immediate operations of the proceeding provisions extending citizenship to the Wyandotte Indians and shall have continued to them the assistance and protection of the United States, and an Indian agent in their vicinity, for such limited period or periods of time, according to the circumstances of the case, as shall be determined by the Commissioner of Indian affairs, and on the expiration of such period or periods, the said exemptions, protections and assistance shall cease, and said persons shall then also becomecitizens of the United States, with all the rights and privileges, and subject to all the obligations above stated and defined."

The foregoing treaty might justify the presumption plaintiffs were citizens of the United States, had it been carried out. Upon the dissolution of the tribe there could have been no further treaties with them, but the government did recognize and treat with them in 1867, which treaty in its preamble states. "A portion of the Wyandotte, parties to the treaty of 1855, although taking lands in severally, have sold said lands and are still poor, and have not been compelled to become citizens, but have remained without clearly recognized organization while others who did became citizens, are unfitted for the responsibilities of citizenship. And, whereas, the Wyandottes treated with in 1855, have just claims against the government, which will enable the portion of their people wherein referred, to begin a new tribal existence. Therefore, it is agreed.

"Art. 13. The United States will set apart for

the Wyandottes, for their future home, the land ceded by the Senecas in the first article hereof and described in said article to be owned by the said Wyandottes in common. And the Secretary of the Interior is hereby authorized and required to appoint three persons whose duty it shall be to ascertain and report to the department the amount of money if any, due by the United States to the Wyandotte Indians under existing treaty. Stipulations and the items mentioned in schedule "A" appended to this treaty, and the report of the persons so appointed, with the evidence taken, shall be submitted to Congress for action at its next session. Aregister of the whole people resident in Kansas and elsewhere, shall be taken by the agent of the Delawares, under the direction of the Secretary of the Interior, on or before the first of July, 1867, which shall show the names of all who declare their desire to be and remain Indians, and in a tribal condition, together with incompetents and orphans as described by treaty of 1855, and all such persons and those only shall hereafter constitute the tribe."

By this treaty the government recognized the fact that the treaty of 1855 had not been carried out, the Wyandotte Indians had not become citizens or at least maintained sufficient tribal organization as to enable the government to treat with them through their representatives and not in severalty That they had not "*not been compelled to become citizens*," That the were still poor and while, some had become citizens, they were unfitted for the responsibilities of citizenship and then settled all

questions of tribal existence by re-establishing the tribe. This being true we feel this court would be justified in or extending to them the protection given to other tribal indians.

If plaintiffs had become citizens, and become sufficiently civilized to care for themselves, their condition was the exception to that recognized by the treaty of 1867, and the burden was upon the defendants to show they were within that exception.

That, being tribal Indians or unable to assume the responsibility of citizenship, no statute of limitation will run against them is so clearly established as to need neither discussion nor authorities.

II.

That the deed from Carey Rogers of November 15, 1864, (page 13, record,) under which defendants hold, is not having been approved by the Secretary of the Interior will not be disputed.

III.

That the same will not constitute sufficient color of title to enable defendants to claim adverse possession is equally well established.

Gibson vs. Choteau, 13 Wall. 99.
Irvin vs. Mitchell, 20 How. 558.
Livingston vs. The Peru Iron Co., 9 Wend. 511.
Gibbs vs. Gas Co., 130 U. S. 412.

Taylor vs. Brown, 6 Da. 339.
Ziller vs. Eckhart, 4 How. 389.
Libby vs. Clark, 118 U. S. 250.
Smythe vs. Henry, 41 Fed. Rep. 706.
M. Gibbs vs Gas Co., 130 U. S. 412.

This court adopts the rule in Man. It states: "The rule of law said Parker C. S. in Russell vs. DeGrand 15 Mass. 35, 39, is of universal operation, that none shall, by the aid of a Court of Justice, obtain the fruits of an unlawful bargain."

No adverse possession can be founded upon a possesion under a deed obtained by fraud or where there is an express pronibition of alienation so that the deed is absolutely void.

Gibson vs. Choteau, 13 Wall. 99.
Irvin vs. Mitchell, 20 How. 558.
Livingston vs. The Peru Iron Co., 9 Wend. 511.

In case of Taylor vs. Brown, 5 Da. 344, the court states:

"In the case at bar the appellant Brown" came into the possession of the land under a deed that its owner had nopower to make, and, as the findings of the court show, he knew his grantor was an Indian at the time of the transaction, and therefore he is to be held to have known, at leastin legal effect, of the disability resting on his grantor at the time of the pretended conveyance, for all persons are persumed to know the law. We cannot. therefore, say that he was in possession in good faith, under color of title. To hold otherwise would defeat the evident intention of the statute, and permit the ap-

pellant Brown, with the law staring him in the face, to initiate a species of deed aud color of title, which would in effect nulify and defeat the protection sought to be thrown around this Indians by the government, and to abrogate the conditions upon which the government parted with its title to the land.

IV.

The grantors of Carey Rogers did not take in good faith the patent to him, contained the limitation upon his alienation of the property, they knew that he was an incompetent Indian and had no right to convey. They did not enter into possession of the property with any reason for belief that their possession would open into a holding. They new the deed under which they claimed was void without the approval of the Secretary of the Interior. They could not hope to circumvent the treaty and obtain title by possession which they could not obtain under the law. No state legislation could abridge the right of the government through its proper office to approve or disapprove these conveyances Gibson vs. Choteau, 13 Wall. 99. Their possession was an absolute nullify so far as confering any right was concerned unless they acquired additions rights upon the death of Carey Rogers or by the treaty of 1867.

No additional rights accured to defendants by the death of Carey Rogers. They acquired nothing thereby and the only question whether his heirs took the property subject to the same conditions and limitations as held by him. If they were tribal In-

dians or otherwise incompetent, then they are entitled to the same protection and subject to the same limitations as Carey Rogers himself, their status would be unchanged, and no possession for any period of time would ripen into a title. There is no provision in the treaty of 1855, whereby property patented to an incompetent Indian is relieved of the limitation upon its alienation upon its passing into the possession of a competent Indian or a citizen. Even if these heirs were citizens the property is subject to the same limitation until relieved by act of Congress.

In Maynes vs. Veale, 20 Kan. 374. It is held "There is nothing in the powers conferred by citizenship independent of the treaty, which of themselves, releases the restrictions upon alienations and if these restrictions are discharged when the allotters become citizens, such discharge or release must be found in some of the treaties."

This being an action at law no question of laches can arise.

V.

The remaining question is whether or not the treaty of 1867 is retractive. Its language as well as the authorities would seem to indicate it was not. The provislon in the treaty is as follows:

Art, 16. "All restrictions upon the sale of land assigned and patented to incompetent Wyandottes under the 4th article of the treaty of 1855, shall be removed after the ratification of this treaty, but no sale of lands heretofore assigned to orphans or incompetents shall be made, under decree of any

court or otherwise for or on account of any claim, judgment execution or order or for taxes until voluntarily sold to the patentee or his or her heirs, with the approval of the Secretary of the Interior; and whereas many sales of land belonging to this class have heretofore been made contrary to the spirit and intent of the treaty of 1855, it is agreed that a thorough examination and report shall be made under direction of the Secretary of the Interior, in order to ascertain the facts relating to all such cases and upon a full examination of such report, and hearing of the parties interested, the said Secretary may confirm the said sales, or require an additional amount to be paid, or declare such sales entirely void as the very right of the several cases may require."

It is not contended that Carey Rogers or his heirs, made any conveyances after the treaty of 1867, it must be conceded that up to that time defendants or their grantor had acquired no rights to or intesest in the property in question, either by grant or otherwise. If in 1867 defendant had been in possession of the property in question for the statutory period of 15 years or any other period the State of Kansas might have enacted, it will not be claimed they had then acquired a title thereto.

If at that time the statute of limitations had commenced to run then they might have acquired a title and asserted the same against the action of the Secretary of the Interior if he had attempted to modify the sale as provided in the treaty of 1867. That this could not be done needs no discussion.

The treaty was not retroactive, Smith vs. Stevens, 10 Wall. 327. This court held: "It is

hardly necessary to say that a joint resolution passed nearly two years after the transaction, cannot relate back and give validity to a conveyance which. when executed, was void, nor have we any reason to suppose that Congress contemplated any such effect, would be claimed for its legislation on the subject."

The only right in the property defendants can claim is that given by the treaty of 1867, and that right is· "That a thorough examination and report shall be made under direction of the Secretary of the Interior in order to ascertain the facts relating to all such cases and upon a full examination of such report and hearing of the parties interested, the said Secretary may confirm the said sales or require an additional amount to be paid or declared such sales eutirely void, as the very right of the several cases may require.

This has not been done. No investigation of the property has been made, will a state statute limit or prevent the Secretary of State acting in the matter, could the state of Kansas pass a law and provide the Secretary of Interior act in this matter within a year or any other period. If the Secretary of Interior should now investigate said sale and act upon the same and declare it void, could defendants claim adverse possession in controvention of this act, most certainly not.

As held in the case of Gibson vs. Cloteau 13 Wall. 99, with respect to public domains, The constitution vests in Congress the power of disposition and of making all needful rules and regulations. The power is subject to no regulation, Congress has the sole absolute right to prescribe the times,

the conditions and the mode of transferring the property, or any part of it and to designate the person to whom the transfer shall be made. No State legislation can interfere with this right or embarass its exercise.

* * *

The same principle which forbids any State legislation interferring with the power of Congress to dispose of the public property of the United States, also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted *by reason of any delay* in the transfer of the title after the initiation proceeding for its acquisition."

The consumation of the title is not a matter the grantees can control, but one which rests entirely within the government. With the legal title when transferred, goes the right to possess and enjoy the land and it would amount to a denial of the power of disposal in Congress if these benefits which should follow upon the acquisition of the title could be forfeited because they were not asserted before that title was issued."

In like manner if the Secretary of Interior should upon investigation as provided in the treaty of 1867, declare the conveyance of Carey Rogers void. These plaintiffs, as heirs of Carey Rogers, would be entitled to enjoy and possess the property in question and no State statute can limit such right.

All of which is respectfully submitted.

CHARLES H. NEARING,
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Attorneys for Plaintiff.

W. M. SPRINGER,
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JOHN SCHURMEIER ET AL.,
Plaintiffs in Error,

v.

No. 19

JOHN P. STOCKTON ET AL.,
Defendants in Error.

In Error to the Supreme Court of the State of Kansas.

SUPPLEMENTAL BRIEF OF PLAINTIFFS IN ERROR.

WILLIAM M. SPRINGER,
Attorney for Plaintiffs in Error.

WASHINGTON, D. C.:
Gibson Bros., Printers and Bookbinders.
1901

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

JOHN SCHRIMPSCHER ET AL.,
PLAINTIFFS IN ERROR,

v.

JOHN S. STOCKTON, ET AL.,
DEFENDANTS IN ERROR.

No. 19.

Supplemental Brief of Plaintiffs in Error.

ERRATA.

The statement, assignment, and brief of plaintiffs in error filed in this case contains quite a number of typographical errors, some of which will be pointed out and corrected.

In line 2, page 3, the word quite should be quiet.

In line 5, of page 7, the word State should be statute.

In line 8, page 13, the word grantors should be grantees.

In line 14, page 13, the word open should be ripen.

There are other errors which the court will readily perceive and which need not be pointed out.

A Question of Statutory Construction.

The decision of the court in this case will largely turn upon the construction which the court will give to the following provisions in the treaty of 1868:

"Art. 16. All restrictions upon the sale of land assigned and patented to incompetent Wyandottes under the 4th article of the treaty of 1855, shall be removed after the ratification of this treaty, but no sale of lands heretofore assigned to orphans or incompetents shall be made, under decree of any court or otherwise for or on account of any claim, judgment, execution, or order, or for taxes, until voluntarily sold by the patentee or his or her heirs, with the approval of the Secretary of the Interior; and whereas many sales of land belonging to this class have heretofore been made contrary to the spirit and intent of the treaty of 1855, it is agreed that a thorough examination and report shall be made under direction of the Secretary of the Interior, in order to ascertain the facts relating to all such cases and upon a full examination of such report and hearing of the parties interested, the said Secretary may confirm the said sales or require an additional amount to be paid, or declare such sales entirely void as the very right of the several cases may require."

This Article is divisible into three propositions:

1. The removal of all restrictions upon the sale of land under the treaty of 1855, after the ratification of the treaty of 1868.

2. Inhibition upon sales of allotted lands for taxes.

3. The status of allotted lands which had been sold between 1855 and 1868, the dates of the ratification of the respective treaties.

As to the first proposition, it is evident that it relates to sales of allotted lands thereafter to be made.

It is a well recognized rule of construction that where the intention as to whether a statute is, or is not, retro-

spective is doubtful, it will be construed as prospective only. (Southerland on Stat. Const., Sect. 463.) In this case there is no room for doubt, for there is an expressed intention to make the statute prospective, that is, to take effect only on sales thereafter to be made. The third proposition above stated clearly establishes this fact. The language of that proposition is to the effect that "many sales of land belonging to this class have heretofore been made contrary to the spirit and intent of the treaty of 1855." This provision relates to lands which had been sold after the ratification of the treaty of 1855, and before the ratification of the treaty of 1868. As such lands had already been sold, in violation of the spirit and intent of the treaty of 1855, the treaty of 1868 very properly and justly placed such lands in a special class, and as to them it was provided, not that the restriction made by the treaty of 1855 should no longer apply, and that sales already made were validated, but that such lands, so sold in violation of the spirit and intent of the treaty of 1855, should be referred to the Secretary of the Interior, for full examination and hearing of the parties interested; and after such examination and hearing, the Secretary was authorized to do one of three things:

First. To confirm the sales.

Second. To require the vendees to pay an additional amount; or,

Third. To declare such sales entirely void as the very right of the several cases may require.

This provision was notice to all concerned that sales of allotted lands by Wyandotte Indians, belonging to the class denominated "not competent," which were made between 1855 and 1868 and not confirmed by the Secretary of the Interior, were made in violation of the spirit and intent of the treaty of 1855, and that the vendees of such sales must

submit their purchases and their deeds to the Secretary of the Interior. Until such persons complied with this reasonable and just provision of a treaty, which was the law of the land, they were regarded by the provisions of the treaty as holding the lands in violation of the spirit and intent of the treaty; or, in other words, unlawfully and fraudulently. Their holdings could only ripen into *bona fide* titles by a compliance with the provisions of the treaty of 1868. Without such compliance, no adverse possession could be set up, and the statutes of limitation of Kansas could not repeal, alter, or modify the Federal treaty. The Federal statute, the treaty of 1868, is still in full force and effect. The vendees of Carey Rogers are still admonished that their title was acquired in violation of the spirit and intent of the treaty of 1855, and that they can acquire no valid title to such land, unless they comply with the provisions of the treaty of 1868. Such vendees have disregarded this admonition. They knew that only $228 had been paid by them for the tract of land now in controversy in this suit (see Record, page 13), and that in 1898 said tract exceeded in value $5,000 (see Record, page 35). Such vendees knew that the Secretary of the Interior would require them to pay to the heirs of Carey Rogers an adequate and just price for such land, and, in default thereof, that the whole transaction would be declared "entirely void."

The duty of making this showing before the Secretary was imposed by law, the treaty of 1868, upon the vendees of Carey Rogers, from whom the defendants in error in this case now hold the land involved in this suit. They have disregarded the law, and now ask this court to condone their unlawful act, and confirm their fraudulent title.

Until the title of the vendees of Carey Rogers to the land in question becomes perfect, as long as anything is required by a Federal statute or treaty to make such title

perfect, such title is inchoate, and partly in the United States. And it is settled that a statute of limitation will not run against the United States, nor can title by adverse possession be acquired as to lands belonging to the United States in whole or in part

The lands in question were conveyed to Carey Rogers by a patent (see Record, pages 12 and 13), which contained this express provision: "That the said tract shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior for the time being." The court will observe that the restriction as to alienation applied to the grantee and "his heirs." The heirs at law of Carey Rogers are the plaintiffs in this suit, and they cannot now sell it without the consent of the Secretary of the Interior.

The treaty of 1868 did not remove this restriction, or affect this title in any way, except to provide that the grantees of the patentee should submit their title to the Secretary of the Interior. They have not done so. Hence their title remains just as it stood in 1868, the fee being still in the United States, and only a right of occupancy being in the patentee. No State statute of limitation can run as to land held by such a title.

Respectfully submitted.

WILLIAM M. SPRINGER,
Attorney for Plaintiffs in Error.

Supreme Court of the United States.

No. 19.—October Term, 1901.

John Schrimpscher et al., Plaintiffs in Error, vs. John S. Stockton et al. } In error to the Supreme Court of the State of Kansas.

[January 6, 1902.]

This was an action of ejectment brought in the Court of Common Pleas of Wyandotte County, Kansas, by John Schrimpscher and about forty others, heirs of one Carey Rodgers, deceased, a Wyandotte Indian, against John S. Stockton and ten others, to recover a tract of land which had been allotted to certain Wyandotte Indians under the treaty of 1855.

Answers were filed by three of the defendants, containing general denials of the allegations of the petition, and pleas both of a three-year and a fifteen-year State statute of limitations.

To these answers plaintiffs filed a reply to the effect that the ancestor of the plaintiffs, from whom they derived title by descent, was an incompetent Indian, and classed as such under the treaty between the United States and the Wyandotte tribe of Indians, concluded January 31, 1855, and, as such incompetent, was prohibited from alienating any of the lands in controversy, except only the power to lease the same for the term of two years; that defendants and those under whom they claim were bound by the same prohibition, and could have acquired nothing further than such leasehold interest in the land; that defendants occupied such lands in subordination to the rights of plaintiffs' ancestor, and that no notice had ever been brought home to plaintiffs of an adverse claim by defendants.

A jury having been waived and the case submitted to the court, judgment was rendered for the defendants. An appeal was taken to the Supreme Court of the State, which affirmed the judgment of the lower court. (58 Kan. 758.) Whereupon plaintiffs sued out a writ of error from this court.

Mr. Justice Brown delivered the opinion of the Court.

This case turns upon the proper construction of article XV of a treaty with a number of tribes of Indians, including "certain Wyandottes," concluded February 23, 1867, and proclaimed October 14, 1868. (15 Stat. 513, 517.)

The facts of the case are substantially as follows:

On January 31, 1855, (10 Stat. 1159,) the United States entered into a treaty with the Wyandotte Indians, by the *second* article of which they

ceded to the United States certain lands purchased by them of the Delawares, the object of which cession was that "the said lands shall be subdivided, assigned and reconveyed, by a patent, in fee simple, in the manner hereinafter provided for, to the individuals and members of the Wyandotte Nation, in severalty." By the *third* article, provision was made for a survey of the lands, the appointment of commissioners to divide the lands among the individuals of the tribe, and to make up lists of all the individuals and members of the tribe, "which lists shall exhibit, separately, first, those familes, the heads of which the commissioners, after due inquiry and consideration, shall be satisfied are sufficiently intelligent, competent and prudent to control and manage their affairs and interests, and also all persons without families; second, those families, the heads of which are not competent and proper persons to be entrusted with their shares of the money payable under this agreement; and, third, those who are orphans, idiots or insane." Article *four* provided for the issue of unconditional patents in fee simple to those reported by the commissioners to be competent to be entrusted with the control and management of their affairs and interests; "but to those not so competent, the patents shall contain an express condition that the lands are not to be sold or alienated for a period of five years; and not then, without the express consent of the President of the United States first being obtained," &c.

Margaret C. Cherloe was a Wyandotte Indian of the competent class, and as such she was given, under the treaty of 1855, allotment No. 42, to sixty-four acres of the land originally sued for, and received a patent therefor in fee simple, without restriction as to conveyance. This patent was dated June 1, 1859.

After the issue of such patent, and prior to August 31, 1863, Margaret C. Cherloe died intestate, leaving her grandson, Carey Rodgers, as her only heir at law, and on August 31, 1863, the said Carey Rodgers made a deed in fee simple of the land so inherited to Jesse Cooper and Mary E. Stockton.

Carey Rodgers, being himself a Wyandotte Indian, belonging to the incompetent class by reason of being an orphan, was given allotment No. 278, containing fifty-seven acres, and on September 1, 1859, received a patent for said lands, containing the following condition: "That the said tract shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior for the time being, and with the further and express condition, as specified in the fourth article of the treaty with the Wyandottes of the 31st of January, 1855, that the lands are not to be sold or alienated for a period of five years."

On November 15, 1864, the said Carey Rodgers executed a deed in fee simple of this last-mentioned land to Jesse Cooper and Mary E. Stockton, covenanting that he was seized in fee simple and had good right to sell the same.

On February 25, 1869, by a partition of that date by Jesse Cooper and his wife, and Mary E. Stockton and her husband, there was conveyed to Mary E. Stockton the lands sued for in this action and described in the petition. Defendants took title from her.

The said Carey Rodgers died intestate in December, 1867, at the age of 21.

Immediately after the execution of the deeds from Carey Rodgers to Jesse Cooper and Mary E. Stockton the grantees took possession of all the land described in said deeds under claim of title and ownership by virtue of said deeds; made permanent improvements thereon, and they and their grantees have had and held open, undisturbed and adverse possession of all of said lands, claiming title thereto, paid all taxes, cleared the land of timber, and cultivated the same as tenants.

In the years 1891 and 1892 there was a kind of occupancy of part of the land by persons claiming under the plaintiffs, but that does not seem to have been treated as material.

Carey Rodgers thus become possessed of two tracts of land, one of sixty-four acres as the heir at law of his grandmother, Margaret C. Cherloe, and the other of fifty-seven acres as a personal allotment to himself. As plaintiffs state that a settlement of the case has been made so far as relates to the Cherloe tract, we shall dismiss that tract from our opinion. The deed of Carey Rodgers' own allotment of November 15, 1864, was clearly void, since as to this contract, at least, he was incompetent, and took under a patent which provided that the land should never be sold or conveyed by the grantee or his heirs, without the consent of the Secretary of the Interior. If the case stood upon defendants' rights under this deed alone, there could be no doubt whatever that Rodgers' heirs were entitled to the land.

But on February 3, 1867, another treaty was concluded (proclaimed October 14, 1868) with several tribes of Indians, among which were "certain Wyandottes," (15 Stat. 513,) the fifteenth article of which was as follows:

"ART. 15. All restrictions upon the sales of lands assigned and patented to 'incompetent Wyandottes' under the fourth article of the treaty of one thousand eight hundred and fifty-five, shall be removed after the ratification of this treaty; but no sale of lands heretofore assigned to orphans or incompetents shall be made under decree of any court, or otherwise, for or on account of any claim, judgment, execution or order, or for taxes, until voluntarily sold by the patentee or his heirs, with the approval of the Secretary of Interior; and whereas, many sales of land belonging to this class have heretofore been made contrary to the spirit and intent of the treaty of one thousand eight hundred and fifty-five, it is agreed that a thorough examination and report shall be made under directions of the Secretary of the Interior, in order to ascertain the facts relating to all

such cases, and upon a full examination of such report, and hearing of the parties interested, the said Secretary may confirm the said sales, or require an additional amount to be paid, or declare such sales entirely void, as the very right of the several cases may require."

This article makes the following distinct provisions:

1. It removes all restrictions upon the sales of lands patented to incompetent Wyandottes, which should thereafter be made.

2. It provides that no sales of lands theretofore assigned to incompetents shall be made under any legal proceedings, or for taxes, until voluntarily sold by the patentee or his heirs, with the approval of the Secretary of the Interior.

3. That, as to lands theretofore sold by incompetents in violation of the treaty of 1855, a thorough examination and report shall be made under the directions of the Secretary of the Interior, in order to ascertain the facts relating to such cases, and upon examination of such report and a hearing of the parties, the Secretary may confirm such sales, require an additional amount to be paid, or declare the sales void.

No action was ever taken under the third clause to procure a confirmation by the Secretary of the Interior of the deed by Rodgers of November 15, 1864, so that, at the time the treaty of 1868 was ratified, the possession of the lands was in the defendants or their grantors holding adversely to the heirs of Rodgers, but the title still remained in such heirs by reason of the fact that his deed to Cooper and Stockton was void, and no proceeding had been taken under the third clause of Art. XV to confirm or validate it. But although the treaty of 1855 and the patent to Rodgers had expressly provided that there should be no alienation by the grantee *or his heirs*, the treaty of 1868, which took effect after his death, removed all restrictions upon alienations which should thereafter be made, either by the incompetent grantee Rodgers, or his heirs, who thereafter held an alienable title, and were bound to assert such title within the time specified by the statute of limitations, although no title could be gained by adverse possession so long as the land continued to be inalienable by Rodgers and his heirs. (*McGannon* v. *Straightlege*, 32 Kan. 524; *Sheldon* v. *Donoh.ue*, 40 Kan. 346.)

Their disability terminated with the ratification of the treaty of 1868. The heirs might then have executed a valid deed of the land, and possessing, as they did, an unincumbered title in fee simple, they were chargeable with the same diligence in beginning an action for their recovery as other persons having title to lands; in other words, they were bound to assert their claims within the period limited by law. This they did not do under any view of the statute, (whether the limitation be three or fifteen years,) since it began to run at the date of the treaty, 1868, and the action was not brought until 1894, a period of over twenty years.

Plaintiffs, however, seek to avoid the effect of the statute by insisting, first, that statutes of limitations do not run against Indians; second, that defendants were not in possession under color of title, and therefore the statute is not available to them; third, that no title by limitation could be acquired as against the right of the Secretary of the Interior to investigate and declare the conveyance in question to be void, and hence the statute would not begin to run until after such action by the Secretary.

1. Conceding, but without deciding, that so long as Indians maintain their tribal relations they are not chargeable with laches or failure to assert their claims within the time prescribed by statutes, as to which see *Felix* v. *Patrick*, (145 U. S. 317, 330;) *S. C.*, 36 Fed. Rep. 457, 461; *Swartzel* v. *Rogers*, (3 Kan. 374;) *Blue Jacket* v. *Johnson Co.*, (Ibid. 299;) *Wiley* v. *Keokuk*, (6 Kan. 94;) *Ingraham* v. *Ward*, (56 Kan. 550,) they would lose this immunity when their relations with their tribe were dissolved by accepting allotments of lands in severalty. Now, the very first article of the treaty of 1855 provides: "Art. 1. The Wyandotte Indians having become sufficiently advanced in civilization, and being desirous of becoming citizens, it is hereby agreed and stipulated that their organization and relations with the United States, as an Indian tribe, shall be dissolved and terminated on the ratification of this agreement; except so far as the further and temporary continuance of the same may be necessary in the execution of some of the stipulations herein; and from and after the date of such ratification, the said Wyandotte Indians, and each and every of them, except as hereinafter provided, shall be deemed, and are hereby declared to be citizens of the United States, to all intents and purposes; and shall be entitled to all the rights, privileges and immunities of such, citizens; and shall in all respects be subject to the laws of the United States, and of the Territory of Kansas, in the same manner as other citizens of said territory; and the jurisdiction of the United States, and of said territory shall be extended over the Wyandotte country in the same manner as other parts of said territory." There was an immaterial exception not necessary to be noticed here.

It seems, however, that this provision did not prove entirely satisfactory to some of the Indians, who regretted their emancipation and the loss of the protection of the government, and in the treaty of 1868 there was incorporated in the preamble a recital that "a portion of the Wyandottes, parties to the treaty of 1855, although taking lands in severalty, have sold said lands, and are still poor, and have not been compelled to become citizens, but have remained without clearly recognized organization, while others who did become citizens are unfitted for the responsibilities of citizenship; and . . . have just claims against the government, which will enable the portion of their people herein referred to begin anew a tribal existence;" therefore it was agreed by article *thirteen* that the

United States would set apart for the Wyandottes certain land ceded by the Senecas, in order to provide for these Indians, and would make a register of all who declare their desire to be and remain Indians in a tribal condition, who should thereafter constitute the tribe.

It is sufficient to say of this that it could not apply to Carey Rodgers personally, since he died before the treaty was ratified; and there is no evidence that his heirs ever elected to resume their tribal relations and to become again members of the incompetent class. As Article XV removed all restrictions upon the sale of lands by incompetents, if the heirs of Carey Rodgers took the position that the article did not apply to them, they assumed the burden of proving that fact.

2. Plaintiffs' assertion, that defendants were not in possession under color of title, is untenable. They had taken possession under a deed executed by Rodgers, November 14, 1864, which was valid upon its face, made by one having title to the land, and in which the grantor covenanted that he was seized in fee simple, had good right to sell the same, that it was free from encumbrance, and that he would warrant and defend the title unto the grantees against the claims of all persons. The court finds that the defendants and their grantors acted in good faith in making the purchase of said lands and in taking this deed, by which we understand that they paid a valuable consideration, and had no actual notice of any defect in the title of their grantor. It is true that if the grantees had examined the Rodgers patent they would have discovered the restraint upon his alienation of the land; but it is too much to say that a deed valid upon its face, and taken in good faith for a valuable consideration, without actual notice of the facts, does not give color of title. Color of title was defined by this court in *Wright* v. *Mattison*, (18 How. 50, 56,) "to be that which in appearance is title, but which in reality is no title." Said Mr. Justice Daniel: "The courts have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title; the inquiry with them has been, whether there was an apparent or colorable title, under which an entry or a claim has been made in good faith." See also *Beaver* v. *Taylor*, (1 Wall. 637;) *Cameron* v. *United States*, (148 U. S. 301, 307.) There was no evidence in this case, except from the patent, that the grantees even knew that Rodgers was an Indian, as was the case in *Taylor* v. *Brown*, (5 Dakota, 344,) much less that he belonged to the incompetent class, and they apparently received the deed, as many people do, without a careful examination of the grantor's title. In Kansas possession without paper title seems to be sufficient. (*Gilmore* v. *Norton*, 10 Kan. 491; *Anderson* v. *Burnham*, 52 Kan. 454.)

The cases cited by the plaintiffs in support of their proposition, that the deed from Rodgers did not constitute color of title, are those wherein

there was an element of fraud, or want of good faith, which are expressly negatived by the finding of the court in this case. (*Livingston* v. *Peru Iron Co.*, 9 Wend. 511.)

3. That no title could be acquired against the right of the Secretary to declare the deed void, and hence the statute would not begin to run until after such action by the Secretary of the Interior. The case of *Gibson* v. *Chouteau*, (13 Wall. 92, 99,) is relied upon to sustain this proposition. In that case it was held that the occupation of lands derived from the United States under a new Madrid certificate, before the issue of a patent, for the period prescribed by the State statute of limitations, was not a bar to an action in ejectment for the possession of such lands, founded upon the legal title subsequently conveyed by the patent; nor did such occupation constitute a sufficient equity in favor of the occupant to control the legal title thus subsequently conveyed. Obviously this case has no application to the one under consideration. Here the United States had issued a patent to Rodgers "and to his heirs and assigns forever," subject to a condition, not that the title should ever revert to the United States, but that he should not alienate the lands without the consent of the Secretary of the Interior. The government thus passed all its title to the land in fee simple, and a violation of the condition of the patent would not redound to the benefit of the United States, or enable it to repossess the lands, but was simply intended to protect the grantee himself against his own improvident acts, and to declare that the title should remain in him, notwithstanding any alienation that he might make.

We have considered all the points taken by the plaintiffs, and are of the opinion that they are not sustained; that the judgment of the Supreme Court of Kansas was right, and it is therefore

Affirmed.

Mr. Justice WHITE and Mr. Justice MCKENNA dissented.

True copy.

Test:

Clerk Supreme Court, U. S.

END OF CASE

In the case of *Davidson* v. *New Orleans, etc.*, 96 U. S. 97, we find the following statement:

"Whenever, by the laws of the state or by state authority, a tax, assessment, servitude or other burden is imposed upon property for public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings can not be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

This declaration we find repeated by the same court in the cases of

Fallbrook Irrigation District v. *Bradley*, 164 U. S., at page 157.

Bauman v. *Ross*, 167 U. S. 548.

If a Tax Can Be Collected ONLY *by Suit in Court, Notice and Opportunity to Contest Them Sufficient.*

In *Walston* v. *Nevin*, 128 U. S. 578, a Kentucky statute providing for special assessments upon property for the improvement of streets was held valid, because such assessments were made collectible *only* through a proceeding in court, of which due notice was required to be given, and there the party had a right to contest the validity of the assessment.

In accordance with these principles, it has been held repeatedly by the supreme court of the state of Minnesota that the law of that state providing for the assessment and collection of omitted taxes upon real estate is a valid law, because it provides for such collection *only* by a regular proceeding in court, in which due statutory

notice must be given, with an opportunity to the tax-payer to make any just defense to the assessment and tax.

State v. *Weyerhauser*, 75 N. W. Rep. 718.
In re Taxes for Itasca County, 71 N. W. Rep. 265.
State v. *Certain Lands*, 42 N. W. 473.

And the same rule has been declared, and these and similar decisions of that court have been upheld by the supreme court of the United States for the very same reason.

Winona, etc., Co. v. *Minnesota*, 159 U. S. 526.
Hagar v. *Reclamation Dist.*, 111 U. S. 701-711.

But it is said this is a proceeding for the collection of the alleged taxes by a proceeding in court provided for by law, and, therefore, it is within the principles announced by the Supreme Court of the United States and state supreme court above cited. There would be plausibility in this contention, if it were provided that these taxes could be collected in no other way except by this proceeding, or possibly if it were left to stand upon the implication that they could be collected in no other way. But unfortunately for the argument of the attorney-general, such is not the fact.

As we have seen, section 8589, being section 171 of the act of which section 8587 is section 169, expressly and in so many words provides that nothing in the act "contained shall prevent the county treasurer from levying upon and selling the property of the estate of any decedent, or any ward or person whose property is held in trust by another, for the payment of any delinquent taxes in the same manner as other property is sold to pay delinquent taxes, and the remedy given to the county

treasurers by the provisions of this act shall be regarded only as cumulative, etc."

In short, this assessment having been made and the tax extended, by the express terms of this statute, the county treasurer was authorized to proceed to levy upon and sell property for its payment, precisely as he would do in case of any ordinary delinquent tax.

Suppose he had levied on property of the estate and was about to sell the same, where is any remedy provided for the tax-payer? Where does he have an opportunity to be heard in court? Of course, the statute, not providing therefor, no one would contend that by a proceeding by injunction he could have "due process of law." Nowhere is it held, though it is suggested in the opinion in the case at bar (Tr., p. 40), that because a citizen has a right to go into a court of chancery for an injunction, the necessity for notice is obviated. And even if he did go into a court of chancery, he would be making a collateral attack upon an assessment, and would be subject to all the disabilities that attend such an attack.

A construction of the statute which should hold that due process of law is provided because, if the treasurer chooses, he may go into court to collect the assessment instead of making a levy and sale, is to put the tax-payer at the mercy of the treasurer, is to make the validity of the statute rest on the election between remedies by the officer, is to make the rights of the tax-payer depend upon the will of the treasurer, and not upon the law of the land. No court, unless it be the supreme court of Indiana in this case, has ever held—we think no other court will hold—that a statute simply giving to the treasurer a cumulative *right* (not imposing a duty) to go into a court for collection of a tax, in which proceeding notice may be

required, meets the requirements of the law as laid down by this court.

But we are not without authority directly upon this question.

In *Scott* v. *City of Toledo*, 36 Fed. Rep. 385, on pages 396 to 402, the late Mr. Justice Jackson, of the Supreme Court of the United States, then circuit judge, discusses this question and holds that where, as here, the statute gives to the authorities an election to collect an assessment made without notice, either by a proceeding in court or summarily by levy and sale, the statute is invalid, as not affording due process of law, and the assessment so made without notice can not be enforced. This was a question relating to a special assessment, but as he shows in the opinion the rule is precisely the same as in relation to ordinary taxes. In the course of the discussion, on page 400, the learned judge says:

"This brings us to the remaining question in the case, viz., in what way, or by what methods, may an assessment like the present be enforced under the statutes of Ohio? Three ways are provided for its collection: First, the amount assessed, with interest, and a penalty of 5 per cent., may be recovered by suit against the owners of the property assessed, before a justice of the peace or other court of competent jurisdiction (section 2288), which, of course, requires notice to the party sued; secondly, by proceedings, in certain designated courts, to enforce the lien, when the owner of the land assessed is a non-resident, which requires notice by publication (section 2288); or, thirdly, the common council may certify any unpaid assessment to the auditor of the county in which the corporation is situated, and the amount so certified is to be placed upon the tax-list, with 10 per cent. penalty, and to be collected with, and in the same manner as, state and county taxes (section 2295), which are collected either by suit, by forfeiture and sale of the land, or by distraint of sufficient goods and chattels belonging to the person charged with such taxes or assessments.

"In the first two methods of collection to which the common council could or might resort, the notice provided for, or required, would constitute 'due process of law' under the authorities above cited; but if, instead of resorting to these methods of collection, the corporation selected, as it might, the third remedy for the enforcement of the assessment, then the owners would be deprived of any opportunity to be heard in regard to the assessment, either as to its validity or amount, and this would violate the requirements of 'due process of law.' In this respect the present case is distinguishable from that of *Hager* v. *Reclamation Dist.*, 111 U. S. 711, and other like cases, relied upon by counsel for defendant, in which the assessment complained of was enforceable only by legal proceedings, in which any defense going either to the validity or amount could be pleaded. The common council of Toledo having made the assessment in question without notice to, or an opportunity for hearing by, complainants, and having the right to enforce its collection by distraining and selling their property, without resorting to any suit which would give them an opportunity to interpose any defense either to the validity or amount of said assessment, its action in the premises, even if authorized by the statutes of Ohio, is wanting in that 'due process of law' required by the federal constitution before depriving the citizen of his property.

"In its material facts, and the principles involved, the present can not be distinguished from the well-considered case of *Stuart* v. *Palmer*, 74 N. Y. 183, which received the express approval of Mr. Justice Field in the *Railroad Tax Case*, 13 Fed. Rep. 753, and was recognized by the supreme court as a correct exposition and application of the constitutional provision relating to the taking of private property under the form of assessment 'without due process of law,' in the case of *Spencer* v. *Merchant*, 125 U. S. 351-358. The opinion of Mr. Justice Earl, in *Stuart* v. *Palmer*, might well be quoted in full, because of its force, clearness, and direct application to the case now under consideration."

Again, in *Meyers* v. *Shields, County Treasurer*, 61 Fed. Rep. 713, the United States circuit court for the northern

district of Ohio had this question under consideration, and it was expressly held that proceedings by a county auditor under the revised statutes of Ohio, section 2781, by which an assessment for taxes of years preceding the current year is entered on the general tax duplicate against the tax-payer without notice or opportunity to be heard, which assessment is a cloud on the title to his realty, and a lien on his property enforceable by distraint and sale of goods without suit in court, deprive him of his property without due process of law, and are invalid under the fourteenth amendment to the constitution of the United States.

That case is exactly in point here. The facts are practically identical. That was the case of an auditor's assessment for omitted property in the past. In that case the treasurer had an election to collect by distraint and sale, or, as is said by the court on page 723, "if the treasurer fails to distrain goods, he may, under section 1097, apply to the clerk of the court of common pleas in his county; and said clerk shall cause notice to be given to the tax-payer, requiring him forthwith to show cause why he should not pay such taxes; and, if he fails to show a sufficient cause, the court, at the term to which said notice is returnable, shall enter a rule against him for the payment of such taxes and the cost of such proceeding, which rule shall have the same force and effect as a judgment at law, and be enforced by attachment or execution or such process as the court directs."

In speaking of the process of assessment, the court says:

"It is not a satisfactory or sufficient answer to the objections urged against the arbitrary action of the auditor to say that his proceedings are only preliminary, and that in a suit brought to enforce the collection of such taxes the tax-payer has his notice and his opportunity for presenting his defense. The proceeding is not of this inno-

cent character. The statute vests in the auditor the power to proceed in a quasi-judicial character. He summons the parties accused and witnesses, he administers oaths, hears the testimony, and then proceeds to a finding, which has far more vitality and efficiency than the judgment of a court, because more summary remedies are provided for enforcing the collection of the assessment which he makes. Without stating the facts upon which his conclusion is based, or the reasons which lead him thereto, he adds to the tax duplicate an assessment, according to the averments of the bill in this case, of $184,108.50. He certifies this supplemental duplicate to the treasurer, and it thereby becomes a lien upon the taxpayer's property, and a blot upon his character and repatation as a truthful and law-abiding citizen."

On page 724 the court says:

"By the same principle, I conclude that it is not 'due process of law' to enter on the tax duplicate, without notice or trial, what amounts in legal effect to a judgment against the tax-payer, enforceable by distraint and sale of his goods and chattels, and afterwards make it 'due process,' because it may become possible for the taxpayer to interpose a defense, provided the collecting officer elects to bring a suit to enforce the collection when the more summary remedies have proven unavailing. This same principle is admirably stated by Mr. Justice Field in the *Railroad Tax Cases*, 13 Fed. 752, when he says:

"'But whatever the character of the proceedings, whether judicial or administrative, summary or protracted, and whether it takes property directly or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. Nothing is more clearly established, by a weight of authority absolutely overwhelming, than that notice and opportunity to be heard are indispensable to the validity of the proceeding. It has sometimes been intimated that a citizen is not de-

prived of his property, within the meaning of this constitutional provision, by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment entered against him. A judgment does not take property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may generally be enforced not only against the real estate upon which it is a lien, but, as in this case, against the personal property of the owner also; and by it he may just as much be deprived of his property, and in the same sense, as the judgment debtor is deprived of his by the judgment.' "

It was accordingly held by Judge Ricks that the assessment was void, because by the law there was fastened upon the property of the tax-payer an assessment which the treasurer was at liberty to enforce by distraint and sale, (although he might collect by suit in court), and, therefore, without any opportunity on the part of the tax-payer to contest the same.

Nor will it do to say that in this particular case the attempt is to collect by a proceeding in court. We are not discussing now the proceedings of the treasurer, but the character of the law under which the assessment was made and under which the collection was to be made. That statute could not be valid and constitutional, or invalid and unconstitutional, at the election of the treasurer. It is absurd to say that if the treasurer elects to collect by proceeding in court, the statute providing for the assessment without notice is valid, but, if he elects to proceed by distraint and sale, it is invalid. The constitutional validity of a statute is not thus to be determined by the whim or election of a county treasurer or other administrative officer.

3. Grounds of Decision by Court Below Indefensible.

But in the opinion of the supreme court of Indiana (Transcript, page 39, bottom, and 40) we find the following:

"A sufficient answer to this is that appellant was an official resident of Marion county at the time the proceeding by the auditor was begun, and therefore within the express terms of this section. He was in a situation to avail himself of all the rights and privileges he asserts are unjustly denied to non-residents, and, while himself not aggrieved, he will not be permitted to assail a revenue statute on behalf of others who are making no complaint. The courts are open to those only who are injured. *Gustavel* v. *State*, at this term; *Pittsburg, etc., Co.* v. *Montgomery*, 49 N. E. 582, 587; *Currier* v. *Elliott*, 141 Ind. 394, 407. Conceding all that appellant affirms concerning his residence, and the absence of any provisions in section 8560 for service of notice on non-residents, still he is not in a situation to complain that he has had no day in court. The assessment by the auditor, right or wrong, was not a final judgment. It was only *prima facie* correct. The courts were open to appellant, even though a non-resident, to challenge it by injunction. Failing to thus seek relief against it, the treasurer appealed to the circuit court for an order against him to show cause why he did not pay the taxes. The jurisdiction of the circuit court over its executor will not be controverted, even though his personal residence is in New Hampshire. He was ordered by the court to show cause, if he had any, why he did not pay the taxes. In response to the order, any defense he had or ever had was open to him.

"It is no longer an open question in this state that if a party against whose property an assessment has been made is at any time in the course of the proceeding before a conclusive judgment afforded by law an opportunity to contest its correctness, he is accorded due process of law within the meaning of the fourteenth amendment.

"*Ganni* v. *Danniman*, 114 Ind. 429.

"*Johnson* v. *Lewis,* 115 Ind. 490.
"*Kiser* v. *Winchester,* 141 Ind. 694.
"*Edwards* v. *The State,* 143 Ind. 84.
"See also *Davidson* v. *New Orleans,* 96 U. S. 97.
"*Hager* v. *Rec. Dist.,* 111 U. S. —, Col.

"Moreover, the right to tax property is a sovereign right, reserved to the jurisdiction charged with the duty of its protection, and the authority of a taxing district to require all classes of property sheltered by it to pay its ratable proportion of the expenses of maintaining the government is unaffected by the residence of the owner.

"The legislature has plenary powers to create a tax for public revenue against all property located in the state, and to provide the procedure for its levy and collection. This had been done by public laws, of which all persons, residents and non-residents alike, must take notice and conform thereto without special summons. The state can not be deprived of the tax because the owner is a resident of another state.

"*Buck* v. *Miller,* 147 Ind. 586, 596.
"*Board of Com.* v. *Reeves,* 146 Ind. 467, 476.
"*Chicago, etc.,* v. *John,* 150 Ind. 113.
"*Graham* v. *Russell,* 152 Ind. 166, 52 N. E. 506."

As to the first sentence of this quotation relating to "official residence," we express our views fully elsewhere in this brief. As to the remainder of the quotation we beg to say that it seems to us to be full of error and false assumptions as to the law.

First. It is asserted that plaintiff in error was not aggrieved because he was in a situation to assert all his rights, even though a non-resident, and it is further assumed that an assessment against plaintiff in error, under a statute providing for no notice, can not be contested in a suit to collect the same, because he might have had it declared void by an injunction. We submit that neither of these two propositions, namely, that the executor is

not aggrieved, nor that he can not defend in this suit on the ground of lack of provision for notice in the law because he might have attacked the assessment collaterally by injunction, will stand the test of argument or authority for a moment. The first assertion must be bottomed upon the contention that, inasmuch as the executor had notice in fact, although the law provided for no notice, he therefore had his day in court and his opportunity to defend. As we have already seen, this contention is directly in the teeth of repeated adjudications by the supreme court of Indiana in cases which that court in this case simply ignored, because there was no way to meet them.

Exactly the same situation existed in *Kuntz* v. *Sumption*, 117 Ind., page 1, where it is shown in the very first paragraph of the opinion that the tax-payer "was subpœnaed before the board and testified as a witness, but did so under protest." He, according to this opinion, was in a condition to assert all his rights, yet the supreme court of Indiana held that the assessment as to him was void for want of notice, because the law provided for no notice.

So in *Eaton, Treasurer*, v. *The Union County National Bank*, 141 Ind. 159, precisely the same situation existed. There was notice in fact, but no notice in law, and it was held there that the assessment was void. If, in the language of the opinion in this case, the tax-payer "was in a situation to avail himself of all his privileges and rights," upon what ground were those assessments void?

And so we might particularize with reference to every case cited by us upon this question, wherein it is held that notice in fact, where there is no provision for notice in law, is no notice at all.

The learned judge writing this opinion cites, in sup-

port of his position touching this point, *Gustavel* v. *State*, 54 N. E. 123, in which it is held that the constitutionality of one section of an act can not be raised in a prosecution under some other section, not in any way related to it; *Pittsburg, etc.*, v. *Montgomery*, 49 N. E. 582, in which it is held that, in an action against a railroad company for damages under the employers' liability act of Indiana, the railroad company can not avail itself of the fact that the act is unconstitutional as to some other corporations; and *Currier* v. *Elliott*, 141 Ind. 394, 407, containing the general declaration that a party who seeks to overthrow a statute must affirmatively establish that the same impairs his rights and is prejudicial thereto. It is not doubted that the law is correctly declared in each of those cases. But what bearing either of them has upon the question under discussion, in which a non-resident tax-payer is contesting the validity of a statute under which his property has been assessed, under a statute providing for no notice to him, is not apparent.

But the learned judge says that this executor might have contested this assessment for want of notice, by injunction, and therefore he can not contest it for want of notice in this direct proceeding to collect. Here again we think has been discovered a doctrine entirely original, and one which might well be copyrighted. It is familiar doctrine that a party who has a direct remedy by appeal, or a right to defend against an action brought to collect a debt or a tax, may not ignore those remedies which the law gives him and go into a court of equity by injunction, and collaterally make his defense. But we think this is the first time it has been held or intimated by any court of last resort that the converse of this proposition is true, that where the law provides for a direct proceeding to collect a tax in court, the tax-payer is precluded from showing that the assessment and levy is void, in that

direct proceeding, because he might have attacked the same by injunction. Of course, no decisions are or can be cited in support of any such doctrine, and its announcement in the case is simply an evidence of the stress of the situation, if this tax was to be upheld.

As we have seen, section 8587 provides for the collection of a delinquent tax by a proceeding in court as in this case. Section 8589 provides, however, that such proceeding shall not prevent the county treasurer from collecting the same by a levy and sale of the property. In other words, it makes the remedy by proceeding in court cumulative only. The language of the opinion as above quoted amounts to a declaration that, notwithstanding there is no provision for notice of the making of the assessment, yet if the treasurer elects to collect by suit in court, the assessment, notwithstanding the want of notice, will be treated as valid, and will be enforced; whereas, if the property owner has commenced a suit to have the assessment declared void and the collection enjoined, the assessment made without notice will be invalid. In other words, in the attempt to avoid the tax by a collateral proceeding, it will be treated as void, while as against the same attempt in a direct proceeding, it will be regarded as valid; notwithstanding that, as in the case at bar, the treasurer, in direct violation of the statute which authorizes only an action "at the next term of court," commenced the suit to collect on the very day succeeding the making of the assessment, and before the tax-payer has had an opportunity, even with the utmost diligence, to file a suit for an injunction.

If this be the law, it is because the highest court of the state has said so, not because it is in accordance with any principle, or sanctioned by any text-writer or other court.

Near the end of the above quotation from the opinion, it is said that the right to tax property is a sovereign

right; that "the legislature has plenary powers to create a tax for public revenue against all property located in the state, and to provide for the procedure for its levy and collection, and that this had been done by public laws of which all persons, resident and non-resident, must take notice and conform thereto without special summons. The state can not be deprived of the tax because the owner is a resident of another state," citing a number of authorities.

No one questions the power of the legislature to tax all property within the state. No one questions that it is its right and its duty so to do. No one questions that residents and non-residents alike must take notice and conform to public laws. But we do deny that taxes can be assessed or collected in the absence of statutes, and heretofore no court has ever asserted that a special assessment of this kind, made after and as a modification of the regular assessment made by public law, can be made without notice. Not only has no court ever decided this, but the supreme court of Indiana time and again has decided exactly the contrary.

On page 8 of 117 Indiana, in the case of *Kuntz* v. *Sumption*, that court has said:

"The tax-payer who has a complaint to make occupies a position very similar to that of the plaintiff in an ordinary action, while the person whose taxes are to be increased is in a position very like that of a defendant. We must hold that such a tax-payer is entitled to notice, or else we must hold that he is bound, at his peril, to keep vigilant watch of the proceedings, lest property he does not own be assessed to him, or the valuation of his listed property be increased. In the absence of notice to him as an individual, he is not bound to exercise any such vigilance. *Claybaugh* v. *Baltimore, etc., R. W. Co.*, 108 Ind. 262; *Munson* v. *Blake*, 101 Ind. 78."

The opinion in *Kuntz* v. *Sumption*, from beginning to end, asserts a doctrine directly at variance with the opinion of the supreme court of Indiana in this case. The same court, over and over again, has endorsed and reaffirmed the opinion in the case of *Kuntz* v. *Sumption*.

The legislature of Indiana, recognizing the correctness of the doctrine there announced, amended the law after that decision was made so as to require notice in such cases; and we venture the assertion that, outside of the opinion in this case, nothing in conflict with the doctrine there asserted can be found either in text-book or report.

As to the assertion in the opinion that the jurisdiction of the circuit court over its executor will not be controverted, even though his personal residence is in New Hampshire, we beg to say such jurisdiction is disputed, except after the executor has been brought into court and required to answer as provided by law.

Scott v. *Dailey*, 89 Ind. 477, is exactly in point upon this question. In that case it is held that the probate court can get no jurisdiction to try any claim against an estate until the matter has been placed upon the docket in accordance with the statute and has remained there for the time prescribed by the statute.

II.

Statute Section 8560 Invalid as Class Legislation and Denial of Equal Privileges and Immunities.

But this assessment is also in violation of section 2, article 4, of the constitution of the United States, that "citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states;" and also of the other provisions of the fourteenth amendment of the federal constitution which forbid any "state to make or enforce any law which shall abridge the privi-

leges or immunities of citizens of the United States," or "to deny to any person within its jurisdiction the equal protection of the laws."

This section, 8560, of the tax law, in providing that, before any resident of the county shall be saddled with a new, extraordinary assessment, he shall have notice and an opportunity to be heard in opposition thereto, but providing for no notice whatever to non-residents of the state and county, is, as it seems to us, a discrimination clearly violative of the above provisions of the federal constitution.

It denies to the citizens of other states, owning property in a given county in Indiana, a privilege and an immunity granted to a citizen of the state resident in that county, in violation of section 2 of article 4 of the federal constitution.

It denies to a non-resident person owning property within a given county in the state the equal protection of the laws, in that it does not give to him the same notice and opportunity to be heard touching the assessment of his property for taxation as is given to a resident of the county, in violation of the fourteenth amendment to the federal constitution.

A few decisions by the state and federal courts make the invalidity of this statute upon these grounds apparent.

A statute of Florida required that before any company, association, firm or individual, not of that state, should transact any business of insurance in that state, it or he should be possessed of at least one hundred and fifty thousand dollars in value, invested in United States or state bonds, or other bankable, interest-bearing stock issued in the United States, at their market value; but such requirement was not made as to domestic unincorporated associations, firms or individuals. The act was

held by the supreme court of Florida to be void, as in violation of section 2, article 4, of the constitution of the United States.

State, ex rel., v. *The Board*, 20 South. 772.

Quoting from *Paul* v. *Virginia*, 8 Wall. 168, the Florida court said:

"It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states. It inhibits discriminating legislation against them by other states. It gives them the right of free ingress into other states, and egress from them. It insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property, and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws."

A statute of Vermont attempted to give to residents of that state the right to deduct debts from their assets in making their returns for taxation, denying the same right to non-residents. This statute was held by the supreme court of Vermont, in a very elaborate opinion, to be in violation of section 2 of article 4 of the constitution of the United States. Many authorities are cited and the subject is discussed at length in the opinion.

Sprague v. *Fletcher*, 37 Atl. 239.

A statute of Michigan attempted to give certain classes of creditors a right to sue and to have their process served in counties where other classes could not have such service of process. This was held to be invalid as class legislation.

O'Connell v. *Menominee, etc.*, 71 N. W. Rep. 449.

But without further citations, it is sufficient to call attention to a very early decision of a federal court, defining what are the privileges and immunities guaranteed by the federal constitution, and the re-affirmance of that declaration by the supreme court of the United States in a very late volume of its published reports.

In the case of *Corfield* v. *Coryell*, 4 Wash. C. C. Rep., on page 380, Mr. Justice Washington, speaking of these privileges and immunities, says:

"The inquiry is, What are the privileges and immunities of citizens of the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for the purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental."

In *Blake* v. *McClung*, 172 U. S., at page 239, a statute of Tennessee was under consideration. That statute provided that a foreign corporation might do business within the state of Tennessee, but it further provided that—

"Creditors who may be residents of this state shall have a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors, for all debts, engagements and contracts which were made or owing by the said corporations previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments."

As against natural persons, creditors of this corporation who were citizens of other states, this statute was held to be unconstitutional and void. In the course of the opinion, the above quotation from the opinion of Mr. Justice Washington is recited and approved, and numerous other decisions are reviewed.

We call especial attention to that part of the opinion of Mr. Justice Washington wherein he says that among the privileges and immunities so guaranteed are "an exemption from higher taxes or impositions than are paid by the other citizens of the state." If this guarantee is against higher taxes or impositions, in order to make the same available, it must also be a guarantee to the non-resident citizen of equal facilities in defending himself and his property against unequal taxation or higher assessments. Otherwise the guarantee against higher impositions amounts to nothing.

Of course, it would not be difficult to multiply the citation of authorities against class legislation and improper discrimination among tax-payers. But the citations which have already been made are deemed to be more than sufficient.

III.

"Official Residence" a Legal Fiction.

But, as before stated, and as the opinion of that court shows, the invalidity of this statute as against a non-resident is recognized by the supreme court of Indiana. It is practically admitted that the statute failing to provide for notice to any one except a resident of the county does not provide due process of law. The supreme court of Indiana, however, for the purpose of sustaining this tax, makes a discovery of a legal fiction in the term "official residence," as bald as was ever sanctioned in common law administration, and resting this assessment upon this legal (or illegal) fiction, sustains the assessment. Let us examine this question of "official residence" and see whether it has any justification either in fact or law.

And we premise by saying that neither in the briefs of counsel below nor in the opinion of the supreme court of Indiana is reference made to any text-book or decided case suggesting such a thing as an "official residence." The idea is purely original, a novel and, barring the question of utility, a patentable invention. And the learned judge who wrote the opinion for the supreme court, rejoicing in his discovery, carries it so far as to make our client not only a resident of Marion county, but "*officially resident in the Marion circuit court.*" (Page 39.) Residence in a court is good, but even this is not enough in this case. The learned judge should have declared our client to be an official resident of the county auditor's office.

A fact fixed, in the nature of things can not be changed by decision. The law says that a man who resides in one county does not reside in another county; that a man

who is a non-resident of the state is not a resident of any county in the state; and this is so in the nature of things, and this must be and is most emphatically true for the purposes of a special statutory proceeding such as is here under consideration.

It can not be fairly claimed that an executor is in any way under the jurisdiction of the auditor of the county with respect to the estate being administered or for any other purpose. Whatever means might exist for bringing him into the circuit court with respect to various proceedings there, he can not be required to appear before the auditor, unless there is some statute making such requirement lawful.

As abundantly established, the fact that such an executor is before the auditor, objecting and protesting to his jurisdiction, has nothing to do with our inquiry. The proceeding is unauthorized, unless there is a law by which he can be lawfully summoned to be present before the auditor in the character of a defendant to the proceeding.

As to non-residents of the county, as plainly appears by reading the statute here under consideration, there is no such provision.

We repeat, the question is not whether he was in the circuit court, but whether he was present or could be brought before the *auditor* without a notice provided for by statute.

Much confusion has resulted in this case by failing to keep in mind that the question as to section 8560 is a question of the assessment, not of the collection of this tax; that the question is as to the jurisdiction of the auditor, and not of the court.

And this confusion has been increased by failing to note that section 8560 is not confined to fiduciaries, but applies equally to all tax-payers. Any tax-payer, whether a fiduciary or not, wherever resident, is sought to be cov-

ered by this section, but notice is provided only for a resident of the particular county whose auditor takes the proceeding.

Yet everybody knows that a tax-payer may have personal property subject to assessment in many different counties at the same time.

Burns, section 8421. Subsections 1, 2, 3, 4.

This is equally true as to property of decedent non-residents of the state, and of a trustee or agent or the owner of property.

Ibid, subsections 6, 7 and 8.

No one will claim that a proceeding under 8560 can be before any auditor except of the county where the property is assessable.

That being so, it follows, according to the logic of the opinion in this case, that a tax-payer is bound to appear, without any provision for notice, before the auditor of any county who calls in question the correctness of his assessment; that is, for the purpose of a proceeding under section 8560 such tax-payer is to be deemed a resident of every county in which he has a cow, a share in a local bank or a lumber pile subject to taxation.

And he must appear before the auditor without notice, unless he resides in the county, for a notice not provided by law is not notice.

Kuntz v. *Sumption*, 117 Ind. 1.

It is submitted that this is not only contrary to all principle, but the legislature in this very section, by providing for notice to a resident, shows that it takes no stock in any such contention. If notice is unnecessary for non-residents of the county, it is equally unnecessary for residents of the county. And if a non-resident is to be deemed for the purposes of this extraordinary assess-

ment present in the auditor's office without notice, much more might such an assumption obtain with reference to a resident of the county.

Not only does the legislature, by providing for notice to residents, stamp with its disapproval this contention, but also providing for the issue and service of a notice to show cause in the proceeding under section 8587 shows that it does not sanction or recognize that an executor or other fiduciary is in court, even though it may be where his estate is pending, without notice. That statute, 8587, provides for issuing an order directed to the fiduciary commanding him to show cause within five days, etc. Will it be contended by this court, or by any one else, that, without service of that order to show cause, the circuit court or any other court could go on and take the subsequent proceedings provided for in that section against a non-resident executor? Would not such proceedings, taken in the absence of showing such service or the voluntary appearance of the respondent, be absolutely void? If so, and if a proceeding of this kind can not be taken against an executor even in the circuit court without provision for notice, how is it to be maintained that the auditor may get jurisdiction and carry forward such a proceeding without any provision for notice whatever?

But not only does this particular section 8587 discountenance the idea that such a proceeding can be had without statutory notice, but numerous provisions of the statutes of Indiana show that the contention that an executor who is a non-resident of the state is to be deemed a resident of the county is untenable.

The record shows beyond controversy that the executor was a resident of the state of New Hampshire.

Section 2402, Burns' Revised Statutes (touching the removal of executors), says, in words as plain as the English language furnishes, that an executor living in

another state is not officially present *even in the court* where the estate is pending, but must be brought in by publication.

The language is:

"If such executor be not a resident of the state, notice of the filing of such application shall be given three weeks successively in some newspaper published in the county where such application is filed, or if none be printed therein, then in some newspaper printed in this state nearest thereto."

If a resident in the county, why the necessity for this publication?

So section 2401, Burns' Revised Statutes, requires an executor resident in the state to be brought in by citation. If he is always present in court, why the citation?

The truth is, the legislature has said as plainly as language can say that an executor who lives out of the state is not a resident of Indiana, official or otherwise. The supreme court of Indiana, for the purpose of sustaining this tax, says that he is. That court might just as well have said that a citizen is an alien or an alien a citizen, that New Hampshire is Indiana, that Allen county is Marion county, that white is black, or that night is day.

Mark, this is not the construction of a state statute. We have no statute defining what shall constitute a resident of Indiana. The legislature has never attempted by enactment to make equal things which in their nature are unequal, to say that a straight line is not the shortest distance between two points, that parallel lines if prolonged will meet, or in any way to do or to sanction by legislation what is here attempted to be done by the court.

If the executor were officially present in the circuit court, would it follow that he is present in the superior court (which would also have jurisdiction to make this

collection, section 8587), or a resident of the county with respect to a proceeding such as this by the *auditor?* Even if "officially present" in the circuit court as executor, is he also "officially present" in the auditor's office?

The statute under which this proceeding was brought in court (section 8587) applies to all fiduciaries, executors, administrators, guardians, receivers and trustees. We suppose it applies as well to trustees not appointed by the court as to such as are appointed by courts. Would such tax-payers be official residents of the county and present in court or auditor's office?

The property of minors under guardianship must be assessed where the guardian resides.

Section 8421, Par. 5, Burns' Revised Statutes.

Suppose the guardian resides in Hendricks county and the guardianship proceedings are pending in Marion county. The assessment in such a case must be in Hendricks county. Then the proceeding under 8560 must be before the auditor of Hendricks county. Must the proceeding under section 8587 be in Marion county, and, if so, is the guardian an official resident of Marion county, or Hendricks county, or both counties? He must be officially taxed where his residence is. But his residence is in Hendricks county. Would his official taxation in Hendricks county, where he resides, be consistent with his official residence in Marion county, where the guardianship is pending?

The property of other persons under guardianship is to be taxed where the ward lives. *Ibid.*

Property in the hands of an executor or administrator is to be assessed in the county where the deceased last dwelt.

Section 8421, Par. 6, Burns' Revised Statutes.

Property in the hands of a trustee or agent is to be assessed where the trustee or agent resides, except as "otherwise by law provided."

Section 8421, Par. 7, Burns' Revised Statutes.

We suppose as to chattels having a local situs it is "otherwise provided" in subsections 1, 2, 3 and 4.

It will be noticed that the word "resides" is the one employed in all these provisions, and is the same word used in 8560 providing for this assessment.

If these statutes mean anything, they clearly show that a fiduciary, under section 8560, may or may not reside in the county where the trust is in court, if it is in court at all. But as to agents and trustees, it is entirely clear that they need have no relation to any court.

One may also be an executor of several estates in different counties at the same time and not reside in either one of those counties, but may reside out of the state. Is he an official resident of each county, and on that account required without any statutory provision for notice to appear before the auditor of each in a proceeding like this?

Wright v. *Wright*, 72 Ind. 149.

Nay, more; as above stated, one as executor, or as agent or trustee, may have *in the same estate* property taxable in one, two or a dozen different counties, as, for instance, if there is farm stock or merchandise locally taxable in several counties, according to the opinion in this case, the executor, or agent, is an "official resident" of every county where he has any chattel property, and is liable to be called before the auditor of each county under 8560 without any statute providing for notice.

The difficulties necessarily arising from such a ruling as the one announced in the opinion in this case, both with respect to correct reasoning and the orderly administration of the law, appear to us insurmountable.

IV.

Official Residence Without Support in Statutes.

But this assumption that the executor was to be treated as an official resident of Marion county, Indiana, for the purpose of taxation has as little support in statute or in precedent as in principle.

In the first place, as we have seen, the legislature of Indiana has expressly provided for non-resident executors, and has expressly provided the steps necessary to be taken, by way of publication and otherwise, for the purpose of getting them into the very court in which their trust is pending.

An executor is not required to be a resident of the state or county.

Burns' Revised Statutes 1894, section 2375.

Nor is an administrator with the will annexed.

Burns' Revised Statutes 1894, section 2379.

Nor an ordinary administrator.

Burns' Revised Statutes 1894, section 2380.

The only case in which an ordinary administrator is required to be a resident of the state or county is when a widow or widower or next of kin does not apply.

Burns' Revised Statutes 1894, section 2380.

An executor appointed in a foreign state may be appointed.

Burns' Revised Statutes 1894, section 2384.

Suppose an executor is appointed in Franklin county, Ohio, and then comes and is appointed in Marion county, Indiana. Is he thenceforward to be treated as a resident of Marion county?

Section 2400 provides for the removal of a non-resident executor or administrator, and section 2402 reads as follows:

"If such executor be a non-resident of the state, notice of the filing of such application (for removal) shall be given three weeks successively in some newspaper published in the county where such application is filed, or if none be printed therein, then in some newspaper printed in this state nearest thereto."

Section 2400 provides what course shall be pursued in case an executor shall remove from the state. Suppose Edward P. Gallup, Executor, is a necessary party to a suit to quiet title or to foreclose a mortgage in the Marion circuit court. Is he to be brought in as a resident or as a non-resident of Marion county and of the state of Indiana? Surely no court would hold that without being brought into court by summons, or by publication, or in some way, a judgment could be rendered against him as such executor.

If the legislature had regarded a non-resident executor as an official resident of the county, even for court purposes, would the foregoing statutes have been enacted? The statement of the proposition is its own refutation.

However, it must be kept continually in mind that the question here is not how the executor can be got into *court* to answer the treasurer's claim under section 8587, but whether he is always present in the *auditor's* office to meet an extraordinary assessment for taxation under section 8560.

As before stated, this statute providing for assessments of omitted property applies to all tax-payers. And it applies equally to corporations as to individuals. Of course, it applies as well to corporations organized under the laws of New York or Ohio or New Jersey as to In-

diana corporations. But if a foreign corporation is the owner of property, as, for instance, the Standard Oil Company, in each of forty different counties in the state, or if a foreign corporation is the trustee or agent of property in each of forty different counties in the state of Indiana, is such foreign corporation to be held an official resident of each of said counties, notwithstanding the rule that a corporation can not migrate or have a legal residence outside of the state of its creation?

V.

Official Residence at Variance with Decisions of Courts.

An examination of the books will show that in the decisions of the courts no sanction can be found for this legal fiction of official residence. Counsel for defendant in error in the court below found nothing of the kind, nor did the court. Its existence was baldly assumed, as we think, without the support either of reason or authority.

It is impossible to find authorities directly upon this exact question, because we do not suppose that such a contention has ever before been made in court.

1. *Residence for Jurisdictional Purposes.*

Of course, nothing is better settled than that for the purposes of jurisdiction in the federal courts it is the actual residence and citizenship of the man, not of the official, that is decisive. Thus, if the suit be by an executor, an administrator, a receiver, a trustee, or in any other representative capacity, the citizenship of the person, not of the official, decides the jurisdiction.

Thus, in *Amory* v. *Amory*, 95 U. S. 186, the petition for the removal of the cause to the federal court alleged that "such plaintiffs as executors are citizens of the state of New York." The court said:

"Where the jurisdiction of the courts of the United States depends upon the citizenship of the parties, it has reference to the parties as persons. A petition for removal must, therefore, state the personal citizenship of the parties, and not their official citizenship, *if there can be such a thing.*"

So it is held that a citizen and resident of Tennessee taking out letters of administration in that state on the estate of a decedent resident and citizen of Tennessee, and afterward removing to Kentucky and becoming a citizen and resident there, may sue as executor in the United States circuit court in Tennessee, there being no law of Tennessee forbidding an administrator to remove from the state.

Rice v. *Houston,* 13 Wall. 66.

So in *Davies* v. *Lathrop,* 12 Federal Reporter 353, an action for damages caused by negligence brought against a receiver of a corporation in a state court of New York, had been removed into the circuit court for that district, on the ground that the receiver was a citizen of New Jersey. A motion was made to remand on the ground that, being an officer appointed by a New York court, the receiver was an official resident and citizen of New York. Judge Blatchford says:

"The defendant, while an officer of the New York court and sued as such, was a citizen of New Jersey. He was a representative as much as the executor or a trustee is. In fact, he was a trustee. The personal citizenship of the executor or trustee is what is regarded. *Rice* v. *Houston,* 13 Wall. 66; *Knapp* v. *Railroad Co.,* 20 Wall. 117, 123."

When the suit is by the obligee of a bond, who is a mere naked trustee without interest, as on a marshal's

bond or sheriff's bond, the citizenship of the beneficiaries, the real parties in interest, is the test.

Coal Company v. *Blatchford,* 11 Wall. 172.
McNutt v. *Bland,* 2 How. 9.
Browne v. *Strode,* 5 Cranch 303.

In case of an executor or administrator, on the other hand, he has the title to the property, and no one else can sue.

Dodd v. *Ghiselin,* 27 Fed. Rep. 405.
Lamar v. *Micou,* 112 U. S. 452.

And the same rule applies where the administrator sues only for the benefit of the widow and next of kin, where the administrator and the defendant are citizens of different states, although the deceased was a citizen of the same state with the defendant, where his widow and children still reside.

Harper v. *Norfolk,* 36 Fed. Rep. 103.

And this rule prevails where a non-resident administrator is appointed for the very purpose of giving the federal court jurisdiction.

Goff's Admr. v. *Norfolk,* 36 Fed. Rep. 299.

Where a non-resident has been appointed administrator in Louisiana, a citizen of Louisiana may sue him in the federal court in that state on the ground of diverse citizenship.

Semmes v. *Whitney,* 50 Fed. Rep. 666.
New Orleans, etc., v. *Gaines, Admr.,* 138 U. S. 595, 600.

Indeed, the legislature of Indiana has distinctly recognized that residence is not affected by a court appointment to a trusteeship by attempting to forbid such appointment.

Shirk v. *City of Lafayette,* 52 Fed. Rep. 857.

It is the residence of the trustee—that is, of the person—that determines in what city or county taxes shall be levied on personal property.

Wade v. *Sewall*, 56 Fed. Rep. 129, 131.

Latrobe v. *City of Baltimore*, 19 Md. 13.

In *Blake* v. *McClung*, 172 U. S. 239, and 176 U. S. 59, this court held that it was not competent for the legislature of a state, by statute, to discriminate against non-residents of the state in the distribution of the assets of an insolvent corporation, because to do so would be to deny to the non-resident the equal protection of the laws.

Suppose that one of those non-resident suitors had been the executor of the last will and testament of a decedent resident of Tennessee, the excutor being a resident, we will say, of Kentucky. Is it possible that a different rule would have been applied as to him by reason of that fact? As above shown, he would have the title to the property, and the absolute right of action would have been in him. And would it have been any answer to his assertion that he was made the subject of unlawful discrimination, that he was an official resident of Tennessee?

Or, take the case of *Dewey* v. *Des Moines*, 173 U. S. 201, where it was attempted to take a personal judgment against a non-resident for the balance of a special assessment against his property. Suppose that non-resident had been an executor to whom the title to the property had been conveyed for administration. Could a judgment have been taken against him or his estate without the service of process, without giving notice, upon the ground that he had an official residence in Polk county, Iowa?

If the legislature of Indiana had made non-residence

a disqualification, or had required that only a resident should be appointed executor or administrator, and had not repeatedly sanctioned by statute the appointment and service of foreign executors and administrators, there would be more plausibility in the contention in this case.

Indeed, the supreme court of Indiana has recognized the fact that one who takes letters of administration or executorship from an Indiana court does not by that fact change his non-residence.

Ewing v. *Ewing*, 38 Ind. 390.

Non-residence is not a disqualification for appointment as executor, nor was even alienage at common law.

11 Am. & Eng. Encyc. of Law (2 ed.), 753.

Alienage is only a statutory disqualification.

Cutler v. *Howard*, 9 Wis. 309.

In re Connor, 16 Montana 465; 41 Pac. 271.

Statutes providing for the removal of an executor who leaves the state do not prevent the appointment of a non-resident.

Corrigan v. *Jones*, 14 Col. 311; 23 Pac. 913.

So a statute providing that if a non-resident is named as executor, an administrator, if there is no other executor, shall be appointed, does not disqualify the original executor.

In re Brown, 80 Cal. 381; 22 Pac. 233.

By the judiciary act of 1888, Sup. to the Revised Statutes, page 612, no suit can be brought against any person in any other district than that whereof he is an inhabitant or whereof the plaintiff is an inhabitant. Under that statute, could Edward P. Gallup, executor, be sued in the United States circuit court for Indiana by a citizen and inhabitant of Ohio? Gallup, the man, is a resident

or inhabitant of New Hampshire. Gallup, the executor, according to this decision, would be an official resident of Indiana. Would the official residence enable the Ohio plaintiff to maintain such action against Gallup's consent?

2. *Residence as to Security for Costs.*

The same proposition, that it is the residence of the person and not of the officer that constitutes the test, is maintained in a large number of adjudications upon statutes requiring undertakings for costs.

In all cases it seems to be the rule that where an executor or administrator is a non-resident, security for costs may be required.

19 Am. & Eng. Encyc. Pleading & Practice 350.

In King's Estate, 9 Weekly Notes of Cases 207, Orphan's Court, it was held that the executor named in the will, a resident and citizen of Massachusetts, must file security for costs.

In the same state it was held that where, after commencing the suit, the executrix removed out of the state, she was bound to give security for costs.

Buck v. *James*, 2 Chester County Reports 401.

So, in Alabama the fact that a non-resident has been appointed administrator by an Alabama court does not relieve him from the requirement that as a non-resident he must give security for costs.

Davis v. *You*, 43 Ala. 691.

So, where a resident administrator had brought his action in the Alabama court and afterward moved out of the state, it was held that, notwithstanding he was still

suing as administrator appointed by an Alabama court, he must give security for costs.

Ex parte Louisville and Nashville R. R., 27 So. 239.

Where an executor lives out of the jurisdiction of the court, he must give security for costs. It does not appear in this case where the executor was appointed, but the inference is it was a domestic appointment.

Chevalier v. *Finnis*, 1 Brod. & Bing. 277. 5 E. C. L. 82.

The same doctrine is laid down and enforced in *Cathcart* v. *Hewson*, Hayes Exch. 173, notes on page 173 and 174. In this case the complainant died and the domestic executor, a non-resident, was substituted, and he was required to give the security.

To the same effect is *Chamberlain's Executor* v. *Chamberlain*, 1 Dowl. Practice Cases 366.

Under the New York statute requiring that a non-resident plaintiff give security for costs, a non-resident who has been appointed administrator by the surrogate of New York county on an estate situated in New York county must give security.

Podmore v. *Seaman*, 57 N. Y. S. 829.
Tracy v. *Dolan*, 52 N. Y. S. 351.

The New York Code of Civil Procedure, section 3268, provides that a defendant may require security for costs whenever, in an action brought in a county court, the plaintiff is a person residing without the county wherein the court is located. Sheerin Special Agency was a corporation of New York having its office and principal place of business in New York county. It brought an action against one Seaman in Westchester county. Seaman moved under the statute for security for costs, be-

cause the corporation was a non-resident of Westchester county. It was claimed on the other hand that the corporation, although its principal office was in New York county, was a resident of every county of the state where it did business. Held otherwise, and that the corporation was rightly required to give security for costs.

Sherin Special Agency v. *Seaman*, 63 N. Y. S. 407.

Would anybody suppose that if this New York corporation had been a trust company, for instance, and as such appointed as an executor or administrator or guardian, that a different rule would have been applied to it, and that it would have been held to be a resident of every county in which it might do business? It seems to us, without further extending this argument, that this doctrine of official residence is, as before stated, a pure fiction, altogether unnecessary and mischievous in the just administration of the law, and that it can not be carried into practical effect without leading to difficulties innumerable.

VI.

The following is a summary of our points and authorities:

I.

The statute, section 8560, is in conflict with the fourteenth amendment to the constitution, because it provides for a change in the assessment of property as made under the general law, without providing any notice to the property-owner.

1. This statute provides for no such notice.

Buck v. *Miller*, 147 Ind. 597.

The manner of assessment must be prescribed by the statute.

State Board v. *Holliday*, 150 Ind. 216.
Sears v. *Street Commissioners of Boston*, 53 N. E. 876.
Charles v. *City of Marion*, 98 Fed. Rep. 166, 168.
Cooley Taxation 244.

The notice must be prescribed by law, and notice not prescribed by law is no notice.

Kuntz v. *Sumption*, 117 Ind. 1.
Stuart v. *Palmer*, 74 N. Y. 183.
Violet's Heirs v. *City Council of Alexandria*, 23 S. E. Rep. 909.
Walsh, Treasurer, v. *The State*, 142 Ind. 363.
Tucker v. *Sellers*, 130 Ind. 514.
Scudder v. *Jones*, 134 Ind. 547.
Terre Haute, etc., Co. v. *Baker*, 122 Ind., at page 441.
Norvell v. *Porter*, 62 Mo. 309.
Osborne v. *Shutt*, 67 Mo. 712.
Harmon v. *Birchard*, 8 Blackf. 418.
Eaton, Treas., v. *Union County National Bank*, 141 Ind. 159.
English v. *The Mayor*, 37 Atl. 158, 162.
Hood River v. *Wasco County*, 57 Pac. Rep. 1017.
Minneapolis v. *McGillivray*, 104 Fed. Rep. 258, 269.
Roller v. *Holley*, 176 U. S. 398, 408, 409.

No tax can be upheld if not within the letter of the statute, although it is within the spirit thereof.

American Net and Twine Co. v. *Worthington*, 141 U. S. 468, 474.

Parker v. *Overman*, 18 How. 137.
M'Clung v. *Ross*, 5 Wheat. 116.
Commercial Bank v. *Sanford*, 103 Fed. Rep. 98.
Williams v. *Peyton's Lessee*, 4 Wheat. 77.
Davis v. *The Board*, 67 N. W. 997.
Hagner v. *Hall*, 42 N. Y. S. 63.
Davidson v. *New Orleans*, 96 U. S. 97.
Fallbrook Irrigation District v. *Bradley*, 164 U. S., at page 157.
Bauman v. *Ross*, 167 U. S. 548.
Savanah v. *City* (Ga.), 23 S. E. 847.

Even the killing of a dog for police purposes can not be justified except upon notice.

People v. *Tighe*, 30 N. Y. S. 368.
Loesch v. *Koehler*, 144 Ind. 278.

2. In all cases where an assessment without notice has been upheld, it has been by reason of the fact that the collector or treasurer was *compelled* to collect by a suit in court where the tax-payer could have an opportunity to be heard.

Hagar v. *Reclamation District*, 111 U. S. 701-711.
Walston v. *Nevin*, 128 U. S. 578.
State v. *Weyerhauser*, 75 N. W. 718.
In re Taxes for Itasca County, 71 N. W. 265.
State v. *Certain Lands*, 42 N. W. 473.
Winona, etc., v. *Minnesota*, 159 U. S. 526.

But in the case at bar the provision for collection by suit in court is merely cumulative. The statute, section 8589, expressly provides that the collection may be by distress and sale at the option of the treasurer. In such

case the law is invalid, since it gives a hearing only by the favor of the treasurer, not as of right.

Scott v. *City of Toledo*, 36 Fed. Rep. 385.
Meyers v. *Shields*, 61 Fed. Rep. 713.

3. The statements in the opinion of the supreme court of Indiana, on pages 39 and 40, to the effect that plaintiff in error is not aggrieved, because he was in a position to assert all his rights and because he could have attacked the assessment by injunction, are wholly unwarranted.

(*a*) He was aggrieved because he was called before the auditor for a hearing without any valid provision of law therefor. The law providing for no notice to him, he had no notice. To hold that because he had notice in fact, was subpœnaed and appeared and testified under protest, he was not aggrieved, is directly in the teeth of—

Kuntz v. *Sumption*, 117 Ind. 1.
Eaton, Treasurer, v. *Union County National Bank*, 141 Ind. 159.

(*b*) The contention that an assessment which might be held void in a suit to enforce the tax in a collateral suit, on an application for an injunction, can not be assailed in a direct proceeding to collect needs no discussion. Exactly the reverse is the rule.

(*c*) And the proposition that because the state is entitled to enforce taxes against non-residents as well as residents, against all property within its borders, therefore, when it attempts to do so in the absence of statutes providing for notice and making due process of law, any resistance is unwarranted, is equally untenable, as has been recognized by the legislature of Indiana and by the supreme court.

(*d*) If the law is inadequate, the tax can not be enforced, and the remedy must be applied by the legislature, and not by the courts.

Thus when the supreme court declared the assessment void in *Kuntz* v. *Sumption, supra,* the legislature amended the act and provided for notice.

Walsh v. *Treasurer,* 142 Ind., on page 363.

(*c*) The proposition in the part of the opinion under review, that the executor is in court for the purpose of meeting claims against the estate at all times, it is submitted, is not borne out by the decisions of the supreme court of Indiana. On the contrary, *Scott* v. *Dailey,* 89 Ind. 477, holds that he is not there, or bound to answer, except when he has been brought in in due form of law and after the lapse of the time prescribed, and that, until then, the court got no jurisdiction.

In the case at bar, on the contrary, he is required to answer without any compliance by the plaintiff with either the conditions or the time for a hearing. The suit is commenced the very day after the assessment, instead of at the next term of the court; and the judgment goes against the defendant, although it is shown that he has not moneys on hand with which to pay the debt.

But, as elsewhere shown, the main question here is not whether the executor is to be deemed present in court, but whether he is to be deemed present in the auditor's office for a hearing before the auditor.

II.

The statute, section 8560, invalid as class legislation and denial of equal privileges and immunities.

Section 2, article 4, constitution of the United States.

Section 1, fourteenth amendment to constitution of United States.

The statute, as above shown, denies to citizens of other states owning property in Indiana a privilege and immunity granted to a citizen of the state resident in the county, that is, notice.

State v. *Board,* 20 South. 772.
Paul v. *Virginia,* 8 Wall. 168.
Sprague v. *Fletcher,* 37 Atl. 239.
O'Connell v. *Menominee,* 71 N. W. 449.
Corfield v. *Coryell,* 4 Wash. C. C. 380.
Blake v. *McClung,* 172 U. S. 239.

III.

The supreme court of Indiana concedes that notice for the making of such an assessment is essential, and that unless this statute provides for notice, it is invalid. But it attempts to escape the effect of this principle of the law by setting up the legal fiction of an "official residence." This is an original discovery. It is supported by no authorities either in the briefs of counsel or opinion of the court.

A fact fixed in the nature of things can not be changed by decision. A non-resident is not a resident.

Question not of jurisdiction of the court, but of jurisdiction of the auditor; not of authority of court to proceed without notice, but of auditor to proceed without notice.

Tax-payer may have personal property subject to assessment in every county of the state.

Burns, section 8421; subsections 1, 2, 3, 4, 6, 7, 8.

Is an executor representing such tax-payer bound to appear without notice in the auditor's office of every county in the state?

This is not the construction of a state statute. There is no statute defining residence.

Statutes of Indiana require notice to non-resident executors or administrators.

Sections 2401, 2402.

Statutes in relation to guardians show that "official residence" would lead to inextricable difficulties.

Section 8421, par. 5, 6, 7.

Wright v. *Wright*, 72 Ind. 149.

IV.

This doctrine of official residence has no support in statute or decision.

The statutes recognize that all fiduciaries, executors, administrators, guardians and trustees may be non-residents.

R. S. Burns, sections 2375, 2379, 2380, 2384, 2400, 2402, 2451, 2452, 2453, 2673, 2703, 2705, 2706.

Neither a non-resident executor, administrator or guardian, or any other fiduciary, can be removed except upon statutory notice, by publication or otherwise, as is clearly shown by the above citations from the statutes.

Would such provision have been made for notice to non-residents if they were regarded as "official residents?"

So as to foreign corporations. Foreign corporations hold property in the state, yet they are non-residents. Indeed, it is held that a corporation can not change its residence. Would a foreign corporation having property in Indiana subject to be assessed under this statute be an "official resident?"

V.

No authority has been found by court or counsel supporting this fiction of official residence.

1. As to jurisdiction of federal courts.

It is the residence of the man, and not the place of appointment of the officer, that gives jurisdiction.

Amory v. *Amory*, 95 U. S. 186.
Rice v. *Houston*, 13 Wall. 66.
Davies v. *Lathrop*, 12 Fed. Rep. 353.

Where the suit is by the obligee of a bond who is a mere naked trustee, as a marshal's or sheriff's bond, the citizenship of the beneficiaries, the real parties in interest, is the test.

Coal Company v. *Blatchford*, 11 Wal. 172.
McNutt v. *Bland*, 2 How. 9.
Brown v. *Strode*, 5 Cranch 303.

In case of an executor or administrator, on the other hand, he has the title to the property, and no one else can sue, and his personal residence determines jurisdiction.

Dodd v. *Ghiselin*, 27 Fed. Rep. 405.
Lamar v. *Micou*, 112 U. S. 452.
Harper v. *Norfolk*, 36 Fed. Rep. 103.
Goff's Administrator v. *Norfolk*, 36 Fed. Rep. 299.
Semmes v. *Whitney*, 50 Fed. Rep. 666.
New Orleans v. *Gaines, Admr.*, 138 U. S. 595.

The legislature of Indiana has recognized that residence is not affected by court appointment to a trusteeship by attempting to forbid such appointment.

Shirk v. *City of Lafayette*, 52 Fed. Rep. 857.

The same doctrine that the residence of the person is the test prevails everywhere.

Wade v. *Sewall*, 56 Fed. Rep. 129.
Latrobe v. *City*, 19 Md. 13.
Blake v. *McClung*, 172 U. S. 239.
Blake v. *McClung*, 176 U. S. 59.
Dewey v. *Des Moines*, 173 U. S. 201.

The supreme court of Indiana has recognized that appointment as executor by an Indiana court does not change the fact of appointee's non-residence.

Ewing v. *Ewing*, 38 Ind. 390.

Nor should it, since non-residence is not a disqualification for appointment as executor or administrator, nor was even alienage at common law.

11 A. & E. Ency. of Law 753 (2 ed.).
Cutler v. *Howard*, 9 Wis. 309.
In re Connor, 16 Mon. 465; 41 Pac. Rep. 271.
Corrigan v. *Jones*, 14 Col. 311; 23 Pac. 913.
In re Brown, 80 Cal. 381; 22 Pac. 233.

2. The same rule is illustrated and enforced as to security for costs required of non-residents. It is the residence of the person, not of the officer, executor, receiver or other fiduciary, that controls.

19 A. & E. Ency. Pleading & Practice 350.
King's Estate, 9 Weekly Notes of Cases 207.
Buck v. *James*, 2 Chester County Reports 401.
Davis v. *You*, 43 Ala. 691.
Ex parte Louisville and Nashville Railroad, 27 So. 239.
Chevalier v. *Finnis*, 1 Brod. & Bing. 277, 5 E. C. L. 82.

Cathcart v. *Hewson*, Hayes Exch. 173 and notes.

Chamberlain's Executor v. *Chamberlain*, 1 Dowl. Pr. Cas. 366.

Podmore v. *Seaman*, 57 N. Y. S. 829.

Tracy v. *Dolan*, 52 N. Y. S. 351.

Sherin Special Agency v. *Seaman*, 63 N. Y. S. 407.

We submit for the foregoing reasons this judgment should be reversed.

The claim that taxes are due from this estate may or may not be true. We have no knowledge on that subject except what we get from the record.

We do know that if such be the fact, it furnishes no excuse for attempting to collect them without law or in violation of law. If taxes are justly due, a way can be found to collect them without violating fundamental principles, and inventing fictions which "will return to plague the inventor" and all others concerned in the future administration of the law.

Respectfully submitted,

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No. 100.

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Reply Brf. of Miller v MacVeagh

IN THE

Supreme Court of the United States.

Filed Oct. 30, 1901.

OCTOBER TERM, 1901.

No. 100.

EDWARD P. GALLUP, EXECUTOR OF THE ESTATE OF WILLIAM P. GALLUP, DECEASED,
Plaintiff in Error,

v.

WILLIAM H. SCHMIDT, TREASURER OF MARION COUNTY, INDIANA,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

We beg to submit a very few words in response to the two briefs filed by William A. Ketcham, special counsel, and William L. Taylor, attorney-general of Indiana.

1. In the statement made by Mr. Ketcham, on page 3, it is said that "on the 4th of January, 1895, being

shortly after the expiration of the year which is allowed for the settlement of decedent's estate under the statute of the state of Indiana, plaintiff in error filed his final report as such executor and caused the same to be set for hearing on January 26, 1895, for final disposition and settlement of said estate." And it is said "The result of which, if approved, would have been to cut off all claims for omitted taxes."

This is an error. Such a settlement, made without attention being called to such a claim, could be readily set aside under section 2558, R. S. 1894, Burns.

Both in Mr. Ketcham's brief and in the brief for the attorney-general, it seems to be made a cause of complaint against the executor that he was prompt in the settlement of the estate. The truth is, that the estate was without debts, and there was no reason for keeping it open longer. If, however, the auditor or any one else had desired to have the estate kept open for the purpose of this claim, it could readily have been accomplished by filing a simple objection to the settlement. The fact that notice had been given for the settlement of the estate is no sufficient reason for filing the claim by the treasurer without waiting for the next term of court or waiting for a time when there was money enough to meet the claim as required by the statute.

2. On page 6 of Mr. Ketcham's brief it is said that "It will not be claimed that the record discloses that decedent did not own the property on account of which the omitted taxes were assessed against him by the auditor."

It is insisted by us that the record does not disclose that he did own it, and it is submitted that in a case of this kind, seeking to increase an assessment, and assuming that a tax-payer has been guilty of

fraud for years, the burden is upon the plaintiff and not the defendant. It is assumed, on the same page, that the fact that the record does not disclose how much the decedent made or lost in trade is sufficient proof that he made or lost nothing, and that his investments were not changed for all the years from 1881 to 1893.

In the statement of facts by the attorney-general, there are a number of things which are not shown by the record, as, on page 3, that the executor was formerly a resident of Indianapolis, and, on page 4, that Gallup entered a full appearance before the auditor, when, as a matter of fact, it does appear, and was found by the court (Finding VIII), that he protested at every step against the jurisdiction of the auditor.

On page 6 it is stated: "The defense is wholly technical. It is not denied that the deceased purposely omitted to report vast sums of property for taxation."

There is no warrant in the record for such a statement. On the contrary, every averment of that kind is denied.

Under Subdivision II of his brief, Mr. Ketcham states, on page 11, that three questions are involved: First, whether the statute is invalid; second, whether it was in the power of the state by its legislation to provide that, for the purpose of taxation, the person in charge of property should be deemed and held to be a resident of the county; and, third, whether, if it was in the power of the state to make such provision by its legislation, it has so provided.

Mr. Ketcham says that if the last two questions are decided in the affirmative, the first is disposed of. We respectfully submit that he has pointed to no statute at all meeting the last or third proposition. If the state has made any provision that a non-resident tax-

payer, whether a trustee, executor or owner in his own right, shall be deemed a resident of the county, Mr. Ketcham would be able to point out the section of the statute making such provision. He has done nothing of the kind. He has quoted a large number of statutes but has not particularized any one that he assumes meets this question, because there is none.

We do not care to say anything as to his discussion under paragraph III, as to the rule of law governing the consideration and determination of constitutional questions, or under paragraph IV as to what is the meaning of due process of law, nor under paragraph V, with reference to what constitutes residence. As to this latter, we submit that as to what is the definition of residence is not material. It is undoubtedly the same in the finding in this case as it is in the statute. The statute, section 8560, as quoted in our original brief, provides, as there shown and as the supreme court of Indiana has held, only for notice to a resident of the county and the finding in this case (Transcript, page 19, last part of Finding VII) is that Edward P. Gallup, as executor of the estate of William P. Gallup, deceased, was then (January 15, 1895), and a long time prior thereto had been and still is a resident of the state of New Hampshire and a non-resident of the state of Indiana, temporarily present at Indianapolis. If the word "reside" or "resident" means the same in the statute that it means in this finding, then this question is foreclosed.

II.

But on pages 25. 26 and 27 of his brief, and under subdivision 6 thereof, Mr. Ketcham tries to show that the case of *Kuntz* v. *Sumption*, 117 Ind. 1, and *Eaton*

v. *The Bank*, 141 Ind. 159, do not apply in this case, and for this purpose he argues that, when the statute says that "if the person claiming to own such property or occupying it or in possession thereof resides in the county and is not present, he shall give such person notice in writing of his intention to add to such property," that that covers notice to everybody that can own taxable property in the county.

In other words, the proposition is that there must be somebody in charge of the property, either as owner, occupant or in possession, and he must be a resident within the county. That is to say, no man can own any personal property in Indiana—a lumber pile, if you please—situated in Steuben county, in the northeast corner of the state, and he, the owner, a resident of Evansville, in the southwest corner of the state, without being in such a sense a resident of Steuben county as that he comes within the purview of this statute. Or, taking intangible property, like credits or promissory notes—a resident of Ohio, Franklin county, if you please—the holder as executor of promissory notes against persons residing in Indiana or elsewhere, belonging to an estate being administered in a county in Indiana, is for purposes of taxation a resident of the latter county. We submit such a proposition does violence to all principles of law hitherto supposed to be applicable to such questions and is its own refutation.

But the attorney-general, Mr. Taylor, says that the case of *Denniston* v. *Terry*, 141 Ind. 677, 679, precludes us from raising this question, because, it is said, it has been waived. The trouble with that citation is that it is not in point. That was a case of an omitted assessment, made by the assessor against a *resident tax-payer*. It appeared that *some* notice was given.

The statute expressly provides for the same notice where the omitted assessment is to be made by the assessor as when made by the auditor. In that case the tax-payer being a resident and some notice being given, it was held that the tax-payer having entered a full appearance and contested the merits, had waived his objection. It was like the case of a man sued under a defective summons or out of his proper county. He could readily waive the question of jurisdiction, and if he appeared and contested the merits without making the question in proper form, he would do so. But that rule has no application where the statute, as in the case at bar, provides for *no* notice. The statute here under discussion as to non-residents provides for no notice. It is in that respect exactly like the statute in the Kuntz-Sumption and the Eaton cases. Indeed in the Eaton case there was a *verbal* notice to the cashier of the bank to appear and answer, but inasmuch as the statute provided for no notice, although he did appear and although he was examined as a witness, as was done also in the Kuntz case, it was held that he was not precluded from asserting that the statute was invalid.

So in the Bowen case, 138 Ind. 434, and every other of the cases cited where an adjudication has been made at all touching this general question, the tax-payer was a resident and the question here at issue was not presented.

III.

In the brief of the attorney-general, much space is given to showing that the plaintiff in error made a full appearance in the circuit court. As the question here is a question of the jurisdiction of the *auditor*,

and not of the circuit court, we do not care to discuss this matter.

The attorney-general also, with great emphasis, over and over, repeats that we have abandoned several questions that we made and insisted upon in the state court, apparently being unaware that no question except the federal question, or something bearing directly thereon, will be considered in this court. We only wish that we could present to this court, and have decided, some of the questions presented to the state court, as for instance, that when the statute of the state said this claim should be filed by the treasurer at the *next term* of court, it did not mean the very day after the assessment and at the same term; and when it said that it should only be filed when there was shown to be *money* enough in the hands of the executor to pay the taxes, it did not mean that it could be filed *instanter*, notwithstanding the complaint showed that there was not money enough on hand for that purpose; or that notwithstanding the supreme court of Indiana says that we had ample opportunity to contest this matter by injunction, as a matter of fact, the claim was filed by the treasurer in this action the very day after the assessment was made, without giving the executor any time to prepare, or file a bill for an injunction. As said in our original brief, we think these matters do throw light upon the manner in which the main federal question here was disposed of.

The attorney-general also says that the general policy of the Indiana statutes is to appoint only residents, administrators and executors. As shown in our original brief this is not only a mistake, but the statutes expressly provide that non-residents may be appointed and may serve in those capacities. And this we say, notwithstanding the alleged dictum of Henry's Pro-

bate Law which, it is said, is the leading authority in Indiana upon this question, but which we are compelled to say we never heard of until we saw it in this citation.

It is also said that it has been adjudged by this court that if a party has an opportunity to enjoin a tax, the assessment thereof is due process of law, although it is made without notice. To this proposition *McMillan* v. *Anderson*, 95 U. S. 37, is cited. But that was in a case where the *statute expressly provided* for the proceeding by injunction; and it is submitted that, in the absence of such a provision in the statute, the making of an omitted assessment without notice would not be due process of law; and so it has been expressly adjudged in the cases cited in our original brief.

Kuntz v. *Sumption* and others, as well as federal cases there cited.

The attorney-general also argues that the residence of the executor must be the residence of the estate because, he says, no one has any right in the estate until after distribution. In this also the attorney-general is in error. The executor of an estate is for all the purposes of taxation and every other proceeding the owner of the estate. He has the legal title, as is shown by the cases cited in our original brief, and as has been repeatedly adjudged by this court.

The attorney-general says that the provision for levy and sale of property of a decedent for taxes is illegal. We submit the manner of collecting such taxes is wholly with the legislature. If it chooses to have the same collected by distress and sale it may do so, notwithstanding the estate may be pending in the probate court. Moreover the statute makes the same a lien and this can not be done without notice.

He also says (page 11) that "all personal property of residents and non-residents in Indiana is assessed to some resident trustee, guardian, administrator or custodian thereof in the state,"—a palpable mistake, especially as to choses in action

The attorney-general says "it is not necessary to notify non-residents of proposed assessments of personal property for omitted taxes." The supreme court concedes that such notice is necessary and invests "official residence" to meet the requirement. That court also concedes that the question is squarely presented in this case and decides it.

The statute cited by Mr. Ketcham on pages 42 and 43 of his brief signify nothing here. If they furnish the only remedy then all the decisions granting injunctions against illegal taxes are wrong.

Again, it is said, and repeated over and over in the brief of the attorney-general, that an executor is bound to appear in the court at any time without notice to any claim. To this we answer that precisely the reverse is the rule. Exactly the reverse has been adjudged by the supreme court of Indiana in the case of *Scott* v. *Dailey*, 89 Ind. 477, where it is held that the probate court can get no jurisdiction of a claim except it goes first upon the appearance or claim docket, and thence, after the lapse of the time prescribed, upon the trial docket.

The entire argument in the case at bar, both of the court and counsel, to the effect that we were not aggrieved because we were bound to appear and answer this claim as a claim against the estate, entirely ignores this statute, as it also ignores the requirements of statute 8587, that the proceeding shall only be commenced at the next term, and only when there

is money enough in the hands of the executor to pay the claim.

The manner in which these several statutes are ignored, and the manner in which it is admitted this claim was made up by the auditor, by simply taking the amount returned by the executor for 1893 and deducting five per cent. for each year back to 1881, indicate the stress of the occasion.

The executor, having been appointed, immediately proceeded to and did make a fair return, as it is conceded, of all the property of the estate for taxation. He knew with reference to the estate just what he found when he came to make the inventory, no more and no less. Having made a fair return of just what he found, he is here charged with disregard of the decencies of life, and with a disposition himself to do wrong, because he would not *admit* these enormous wrongs charged against his brother. It is assumed that he ought at once, without knowing the condition of things at all, to have acceded to every charge that was made, and paid every demand that was made upon him. We submit that this was not called for, either by his duty to the public, to his brother's estate, to the memory of his brother, or to himself.

Respectfully,

W. H. H. Miller,
Attorney for Plaintiff in Error.

Wayne MacVeagh,
of Counsel.

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Filed Feb. 9, 1901.

Office Supreme Court U. S.
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FEB 9 1901
JAMES H. McKENNEY,
Clerk.

PREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

TERM No. 336.

FILE No. 17,821.

DWARD P. GALLUP, EXECUTOR OF WILLIAM P. GALLUP, DECEASED, PLAINTIFF IN ERROR,

vs.

ILLIAM H. SCHMIDT, TREASURER OF MARION COUNTY, INDIANA.

ERROR TO THE CIRCUIT COURT OF MARION COUNTY, INDIANA.

TITION BY DEFENDANT IN ERROR FOR ADVANCEMENT OF CAUSE.

NOTICE OF MOTION TO ADVANCE.

SENTINEL PRINTING COMPANY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

TERM NO. 336.

FILE NO. 17,821.

EDWARD P. GALLUP, EXECUTOR OF WILLIAM P. GALLUP, DECEASED, PLAINTIFF IN ERROR,

vs.

WILLIAM H. SCHMIDT, TREASURER OF MARION COUNTY, INDIANA.

IN ERROR TO THE CIRCUIT COURT OF MARION COUNTY, INDIANA.

PETITION BY DEFENDANT IN ERROR FOR ADVANCEMENT OF CAUSE.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Armin C. Koehne, who is the treasurer of Marion county, Indiana, as the successor of William H. Schmidt, would respectfully represent and show that he is the treasurer of Marion county, duly elected and qualified and in the discharge of the duties of such office, among which duties is the collection of the taxes for and on account of the State of Indiana, and the various political sub-divisions thereof within Marion county, Indiana, to-wit: The County of Marion, the City of Indianapolis, the school City of Indianapolis, and the various townships in said county, including Center township, and that no other officer or person than himself is authorized to collect the revenues of the State derived from taxation within the County of Marion; that the judgment of the Mairon Circuit Court in favor of William H. Schmidt, as treasurer of Marion county, Indiana, was rendered in the proper exercise of the duties by said Schmidt to collect the taxes due from the estate of said William P. Gallup for the State of Indiana and the other political sub-divisions thereof, as hereinbefore set forth; that the term of office of said Schmidt having expired since the rendition of said judgment, that duty has been devolved upon your petitioner, and the judgment has been properly assigned and transferred of record to your petitioner, and it has been, and is, therefore, his duty to enforce the collection of said judgment by proper proceedings thereon, and that no other method

of reaching the revenues due the State, and such other political sub-divisions as hereinbefore set forth exist, except through the collection of said judgment, and your petitioner shows that by the pendency of this writ of error the revenue laws of the State of Indiana are staid in this suit; that the collection of the moneys due upon said judgment, as shown by the record, has been delayed since the date of the institution of the action, viz: the 26th day of January, 1895.

Your petitioner therefore prays that this cause may be advanced for hearing upon the docket of this honorable Court, and that the same may be heard at as early a date as the convenience of the Court will permit, in preference to any other civil cause pending in this Court between private parties. And he prays for such other and proper orders in the premises as may to the Court seem meet.

ARMIN C. KOEHNE,
Treasurer Marion County, Indiana.

By HENRY L. SMITH,
Deputy.

WILLIAM L. TAYLOR,
Attorney-General of Indiana.
MARTIN M. HUGG,
Attorney for Marion County, Indiana.
WILLIAM A. KETCHAM,
Of Counsel for Defendant in Error.

Henry L. Smith being first duly sworn, upon his oath says that he is the principal deputy of Armin C. Koehne, treasurer of Marion county, Indiana; that said Armin C. Koehne is now absent from the State of Indiana, being in the State of Florida at the present time; that in the absence of said Armin C. Koehne affiant is authorized to discharge for him all duties connected with said office of treasurer of Marion county, Indiana, and to sign and execute for him all instruments required of said Armin C. Koehne as such treasurer, and affiant has signed the above petition in his behalf, and does now make this affidavit in his behalf; that the matters and facts set forth in said petition are true in substance and in fact as therein averred and set forth. And further affiant saith not.

HENRY L. SMITH.

STATE OF INDIANA, }
Marion County, } ss:

Subscribed and sworn to before me, the undersigned, a Notary Public within and for said county and state, this 1st day of February, 1901.

Witness my hand and notarial seal.

HENRY G. COX,
Notary Public.

My commission expires January 30, 1904.

[SEAL.]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

TERM No. 336.

FILE No. 17,821.

EDWARD P. GALLUP, EXECUTOR OF WILLIAM P. GALLUP, DECEASED, PLAINTIFF IN ERROR.

vs.

WILLIAM H. SCHMIDT, TREASURER OF MARION COUNTY, INDIANA.

IN ERROR TO THE CIRCUIT COURT OF MARION COUNTY, INDIANA.

NOTICE OF MOTION TO ADVANCE.

The plaintiff in error is hereby notified that on Monday, the 11th day of February, 1901, or as soon thereafter as the Court will hear the same, the defendant in error will petition the Court in the above cause for an order of advancement and that the same may be set down for argument at as early a date as the convenience of the Court will permit, in preference to any civil cause pending in such Court between private parties.

WILLIAM A. KETCHUM,
Of Counsel for Defendant in Error.

WILLIAM L. TAYLOR,
Attorney-General of Indiana.

MARTIN M. HUGG,
Attorney for Marion County, Inniana.

We hereby accept of the above and foregoing notice this 2d day of February, 1901.

W. H. H. MILLER,
Attorney for Plaintiff in Error.

No. 100.

FILED
OCT 24 1901
JAMES H. McKENNEY,
Clerk.

Brief of Taylor for D. E.

IN THE

Supreme Court of the United States

Filed Oct. 24, 1901.

OCTOBER TERM, 1901.

EDWARD P. GALLUP,
EXECUTOR OF THE ESTATE OF WILLIAM P. GALLUP, DECEASED,
Plaintiff in Error,
v.
WILLIAM H. SCHMIDT,
TREASURER OF MARION COUNTY, INDIANA,
Defendant in Error.

No. 100.

BRIEF FOR DEFENDANT IN ERROR.

WILLIAM L. TAYLOR,
ATTORNEY-GENERAL OF INDIANA,
Attorney for Defendant in Error.

MARTIN M. HUGG, *County Attorney,*
FREDERICK A. JOSS, *City Attorney,*
MERRILL MOORES,
CASSIUS C. HADLEY,
Of Counsel.

WM. B. BURFORD, PRINTER, INDIANAPOLIS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1901

BRIEF FOR DEFENDANT IN ERROR

10131

IN THE

Supreme Court of the United States

OCTOBER TERM, 1901.

EDWARD P. GALLUP,
EXECUTOR OF THE ESTATE OF WILLIAM P. GALLUP, DECEASED,
Plaintiff in Error,
v.
WILLIAM H. SCHMIDT,
TREASURER OF MARION COUNTY, INDIANA,
Defendant in Error.

No. 100.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

The statement of facts contained in the brief of plaintiff in error does not fully cover the case, and, therefore, we make a more extended statement of facts, believing that by so doing we will shorten this brief and emphasize the correctness of the decision of the supreme court of Indiana.

In December, 1893, William P. Gallup, a bachelor, died testate in Indianapolis, Marion county, Indiana, leaving an estate of about $500,000, all of it subject to taxation except $43,600. In April of that year he had made a sworn tax return of $20,560. For more than thirty years he had been a resident of the city, and for many years the president of a bank therein.

On January 4, 1894, Edward P. Gallup, brother of deceased, qualified as executor in the circuit court of Marion county, Indiana.

On February 27, 1894, and before any inventory had been filed by such executor, and before any tax officer knew the value of the decedent's estate or that there was any omitted property whatever and before any assessment of omitted property was suggested by any tax officer, Gallup, the executor, voluntarily went into the county treasurer's office of Marion county, and paid as a kind of vicarious conscience fund the sum of $5,750 as a "first installment of state, county, township and city of Indianapolis taxes for the year 1893, and in full of all property belonging to William P. Gallup's estate *that may have been omitted* from the tax duplicates during the years 1891, 1892 or 1893, and arrears." The executor afterward set up this transaction as a payment in full of all taxes due, but has since abandoned that defense.

Two days later, on March 1, 1894, Gallup, the executor, verified his inventory as such executor, and five days later filed such inventory in the clerk's office of the Marion circuit court. The inventory was doubtless made up ready

for filing before said pretended settlement was made with the treasurer. The entire estate is made up of personal property. This inventory, made by two appraisers appointed by the executor, appraised the estate at $492,628.26.

On January 4, 1895, exactly one year from the day of his appointment as executor, Gallup filed his final report in the clerk's office of said court, and had the same set for hearing on January 26, both dates being the shortest possible time allowed by law for filing an executor's final report and having a hearing thereon.

On January 15, 1895, Taggart, auditor of Marion county, pursuant to statute, served a written notice upon Gallup, executor, that within five days from receipt of notice Gallup should appear and show cause why certain omitted property should not be listed for taxation, setting out specifically the amount of omitted property for each year from 1881 to 1893, inclusive. This notice was in writing, and on the same day was served personally upon Gallup, executor, by the sheriff of Marion county, by reading and delivering copy of such notice to such Gallup as executor, in the city of Indianapolis, where Gallup then and for some time prior thereto had been.

Gallup, the executor, formerly was a resident of the city of Indianapolis, and had been in business with his brother, the deceased.

On January 21, 1895, Taggart, auditor, issued a subpœna for Gallup, executor, to appear forthwith before him and bring with him all the notes, bonds and mortgages in

his possession as such executor, and to testify in such proceedings, which subpœna was personally served by the sheriff of Marion county upon said Gallup, executor, who was then in Indianapolis; and on the next day Gallup appeared in person and by counsel before such auditor and agreed with the auditor that the examination should be postponed until three days later, the 24th of January; at that time Gallup again appeared in person and by counsel and entered a full appearance, not a special appearance, to the proceeding, and filed a pretended protest against any further proceeding by the auditor.

Gallup was examined, under oath, touching the matter in controversy here, and was asked to show cause why the property set forth in the notice and schedule of the auditor should not be listed for taxation. A large amount of evidence was taken, and, after the hearing, the auditor found his information had been correct, and he placed upon the duplicates for the years beginning 1881 and ending with the year 1893, the several amounts set out in the special finding of facts, as shown in the record, aggregating $61,233.59. (See record, p. 17.)

On January 26, 1895, the day set for the hearing of the executor's final report, and being the last day in which a claim for taxes could be filed that would be at all effective upon the personal property in the hands of the executor, who lived in New Hampshire, the treasurer of Marion county filed a claim in the clerk's office of the Marion circuit court, in the matter of the said estate, for these omitted taxes.

The Marion circuit court, under the statute of Indiana, has exclusive and original jurisdiction of all probate matters.

On February 9, 1895, Gallup, executor, entered a full and not a special appearance to this claim, he being present in person and by counsel, and moved to dismiss the said treasurer's claim for three reasons. (See record, p. 5.) This motion was overruled, and, on the 18th of December, 1897, Gallup excepted to the ruling of the court, and on the 29th of December following filed his bill of exceptions.

On the 18th of June, 1898, Gallup again entered a full appearance and filed a demurrer to the complaint for claim. (See record, p. 6.) The demurrer was overruled, and thereupon he again entered a full appearance to the case and filed six paragraphs of answer.

Five months later he again entered a full appearance and filed a seventh paragraph of answer, and three days later again entered a full appearance and filed an eighth paragraph of answer.

On October 13, 1898, being more than three and a half years after the claim was filed, the hearing was finally concluded. A large amount of testimony, covering more than two hundred pages, was taken before the auditor and the circuit court, and by request of both parties a special finding of facts was made and conclusions of law thereon returned by the court (see record, p. 17), and judgment entered in favor of the plaintiff below for $46,996.69. The auditor had charged the sum of $61,233.59 against the estate of Gallup, deceased. Exceptions were taken to the

finding and judgment of the court; errors were assigned and an appeal prosecuted to the supreme court of Indiana; which court affirmed in part and reversed in part the decision of the circuit court, and directed the circuit court to add the sum of $5,750 to the sum found due by the trial court, and pursuant thereto judgment was finally entered for $52,745.69. (See record, page 37, et seq.)

From the Marion circuit court the case came here.

Now all these proceedings below were had not as a separate, independent cause of action, with a separate title, but everything was done in the Marion circuit court and the supreme court under the title: "In the Matter of the Estate of William P. Gallup, Deceased." The defense is wholly technical. It is not denied that the deceased purposely omitted to report vast sums of property for taxation. The court, after having given the estate the benefit of all doubts, held that the Gallup estate was indebted for omitted taxes in the sum of $52,746.69.

THE ISSUES.

The plaintiff in error has not brought here any of the large amount of testimony introduced in the case.

The first appearance of the plaintiff in error in the Marion circuit court was a full, and not a special, appearance. The motion filed by Gallup was to strike from the files the claim of the treasurer. Three reasons were assigned:

1. That the treasurer was not authorized to present the claim at the January term, 1895.

2. That the claim was not verified.

3. That the taxes were not assessed by the auditor within one year after the appointment of Gallup as executor.

(See record, p. 5.)

Exceptions were taken to the overruling of this motion, but they have been entirely abandoned here by the plaintiff in error so that the appearance there entered stands as a full appearance in the case. The exception taken to the overruling of demurrer (record, p. 6) has also been abandoned here.

The first paragraph of answer was a general denial. The second was a plea of payment. The third was a specific plea of payment. The fourth was a plea of the statute of limitations. All issues tendered by these paragraphs of answer have been entirely abandoned here.

The sixth paragraph of answer, filed nearly two and a half years after the commencement of the proceedings in the case tenders the only issue in the case. The seventh and eighth paragraphs are abandoned here.

The sixth paragraph of answer alleges that Gallup, the executor, at no time of the year 1894, or since, was a resident of Marion county, Indiana, but has been a citizen of New Hampshire, and that no provision was made by law for notice to him of the proposed assessment of omitted property, and that this action therefore is in violation of the fourteenth amendment of the constitution of the United States:

First. Because he was deprived of his property without due process of law.

Second. Because he was denied the equal protection of the law. And that it is further invalid because in violation of the constitution of the United States, in that the statute of Indiana grants to residents of a particular county privileges and immunities which do not equally belong to all citizens.

A demurrer was filed to this answer, and sustained.

(See record, pp. 10 and 11.)

Of all the questions reserved and strenuously urged in the supreme court, all have been abandoned here, except the question raised in the sixth paragraph of answer, namely, that because Gallup, executor, being personally but not officially a non-resident of Indiana in 1894, could not be served with a notice of any kind either in Marion county, Indiana, or elsewhere, of the proposed assessment of omitted taxes on personal property of the estate, because the statute makes no provision for notice to non-residents of such proposed assessment by the county auditor.

POINTS AND AUTHORITIES.

The circuit courts of Indiana have exclusive original jurisdiction of all probate matters.

Section 2365, Burns' R. S. 1894.

The general policy of the Indiana statutes is to appoint only residents as administrators and executors, and removal from the state by an administrator, after his appointment, vacates his trust.

Sections 2375-2380, R. S. 1894;
Acts 1901, p. 281;
Henry's Probate Law and Practice (Ind.) 2d ed., section 41.

All claims against estates must be filed in the circuit court, where the estate is pending, and no independent action is allowable.

Section 2465, R. S. 1894.

The filing of the claim is the commencement of the action and is notice to the executor or administrator.

Section 2473, R. S. 1894.

Administrators and executors become parties to claims filed against estates by *operation of law, and are bound to take notice of the filing of such claims without summons or other notice.*

Taggart v. Tevanny, 1 Ind. App. 239, 346;
Sanders, admx., v. Hartage, 17 Ind. App. 243, 247;
Bowman, admr., v. Bank, 25 Ind. App. 38, 42, 53;
Stapp, admr., v. Messeke, 94 Ind. 423, 424.

If the filing of the claim was not notice, yet a general appearance by the executor or administrator waives all irregularities and gives the court full jurisdiction of the claim.

Sanders, admr., v. Hartage, 17 Ind. App. 243, 249;
Stapp, admr., v. Messeke, 94 Ind. 424;
Frazer, executor, v. Boss, 66 Ind. 1;
Morrison, admr., v. Kramer, 58 Ind. 38, 48;
Nesbit v. Long, 37 Ind. 306, 302;
Deniston, auditor, v. Terry, 141 Ind. 677, 679.
Bowman, admx., v. Bank, 25 Ind. App. 38, 53.

Claims must be allowed or disallowed by executors, and, if disallowed, must be transferred to trial calendar for trial, as an ordinary civil case.

Sections 2476-2480, R. S. 1894.

Heirs, devisees and legatees prove their claims to the *surplus* only, if there is any, when final settlement account has been filed after the end of the year, and after all claims, including claims for taxes, have been paid.

Section 2562, R. S. 1894;
Glessner, admr., v. Clark, 140 Ind. 427;
Schmidt, treas., v. Failey, receiver, 148 Ind. 150, 153, 154.

All property within the jurisdiction of this state is subject to taxation. This includes personal property of non-residents that has a situs in this state.

Section 8410, R. S. 1894.

Personal property of the estates of deceased persons in Indiana is assessed to the person in charge of such property in the township, town or city *where the deceased last dwelt* until such property has been distributed to the heirs, or other persons entitled thereto.

Section 8421, clause 6, R. S. 1894.

All personal property of residents and nonresidents in Indiana is assessed to some resident trustee, guardian, administrator or custodian thereof in the state (cl. 4).

Section 8421, R. S. 1894, cl. 4.

It is the duty of every taxpayer to make a return under oath of his taxables as of the 1st of April, each year.

Section 8458, R. S. 1894.

It is not necessary to notify nonresidents of proposed assessment of personal property for omitted taxes.

Section 8560, R. S. 1894;
Buck v. Miller, treas., 147 Ind. 586, 589, 591;
Gallup, admr., v. Schmidt, 154 Ind. 196;
Chicago & Erie Rd. Co. v. John, treas., 150 Ind. 113, 116;
Reynolds, auditor, v. Bowen, admr., 138 Ind. 434, 447.

It is the duty of every executor to pay all taxes due from the decedent's estate, and if he fails so to do, then it becomes the duty of the treasurer to file a claim against said

executor in the circuit court, upon which claim issues are made and trial had as in a civil action.

Section 2534, R. S. 1894;
Section 8587, R. S. 1894;
Wilson v. White, 133 Ind. 614.

Administrators and executors, no matter where they may reside, are officers of the court and within its jurisdiction, and must, without notice, appear to such claim for taxes.

Section 2473, R. S. 1894;
Schmidt, treas., v. Failey, receiver, 148 Ind. 150, 152, 153;
Taggart, admr., v. Tevanny, 1 Ind. App. 339, 346;
Reynolds, auditor, v. Bowen, admr., 138 Ind. 434, 447;
Gallup, executor, v. Schmidt, treas., 154 Ind. 196, 202.

Executors and administrators may contest assessment of omitted taxes in the circuit court when the treasurer files claim therefor, and this affords due process of law, even though no appearance was entered or service had when the assessment was made by the auditor.

Section 8587, R. S. 1894;
Reynolds, auditor, v. Bowen, 138 Ind. 434, 447;
Deniston v. Terry, 141 Ind. 677, 679;
Davidson v. New Orleans, 96 U. S. 97, 105;
Hagar v. Reclamation District, 111 U. S. 701, 711;

Walker v. Sauvinet, 92 U. S. 90, 93;
Kennard v. Louisiana, 92 U. S. 480, 482, 483;
State Railroad Tax Cases, 92 U. S. 575, 614.

Due process of law is process according to the law of the land, and this process in the states is regulated by the laws of the states.

Allen v. Georgia, 166 U. S. 138, 140 (bottom of page);
Wilson v. North Carolina, 169 U. S. 586, 593;
P., C., C. & St. L. Ry. Co. v. Backus, 154 U. S. 421, 425;
Walker v. Sauvinet, 92 U. S. 90;
Hurtado v. California, 110 U. S. 516, 533;
State R. R. Tax Cases, 92 U. S., p. 618.

Due process of law is afforded a litigant if he has an opportunity to question the validity or the amount of an assessment or claim or charge before the amount is determined, or at any subsequent proceedings for its collection, or at any time before final judgment is entered.

Winona Land Co. v. Minnesota, 159 U. S. 526, 537;
Davidson v. New Orleans, 96 U. S. 97, 105;
In re. Converse, petitioner, 137 U. S. 624, 632;
Marchant v. Pennsylvania Railroad Co., 153 U. S. 380, 386;
Kentucky Railroad Cases, 115 U. S. 321, 334;
Spencer v. Merchant, 125 U. S. 345, 356 (top of page);

Lent v. Tillson, 140 U. S. 316, 328;
McMillen v. Anderson, 95 U. S. 37, 42;
Palmer v. McMahon, 133 U. S. 660, 669;
Paulson v. Portland, 149 U. S. 30, (top of page) 41, 42 (bottom of page);
P., C., C. & St. L. Ry. Co. v. Backus, 154 U. S. 421, 426;
Gallup, executor, v. Schmidt, treas., 154 Ind. 196, 202;
Murdock v. City of Cincinnati, 44 Fed. 726, 729;
Garvin v. Daussman, 114 Ind. 429, 436 (middle of page);
Johnson, surveyor, v. Lewis, 115 Ind. 490, 492;
Kizer v. Town of Winchester, 141 Ind. 694, 696 (bottom of page).

A revenue law of a state may be in harmony with the fourteenth amendment, although such law does not furnish an opportunity to be present when the tax is assessed, nor that the tax shall be collected by suit. If the taxpayer has a right to enjoin collection this is due process of law.

McMillen v. Anderson, 95 U. S. 37, 42.

But the estate of William P. Gallup is not a nonresident estate. It is a resident estate, hence nonresidence of the executor is of no possible moment where the court has control of the property.

Gallup v. Schmidt, treas., 154 Ind. 196, 202;
Schmidt, treas., v. Failey, receiver, 148 Ind. 150, 152, 154;

Section 8421, R. S. 1894, clause 6;
Section 2365, R. S. 1894.

Laws are to be construed liberally in aid of the taxing power, and all taxes are presumed to be valid until the contrary is affirmatively shown, and no irregularities will invalidate them that do not affect the merits of the case.

Section 8642, R. S. 1894;
Hunter Stone Co. v. Woodard, 152 Ind. 474, 478;
Reynolds, auditor, v. Bowen, 138 Ind. 434, 441 (bottom of page), 454;
Saint v. Welsh, 141 Ind. 382, 393;
Buck v. Miller, 147 Ind. 586, 599 (top of page).

A statute that directs a tax officer to seize for taxes personal property in the hands of the court is unconstitutional and void.

Section 8587 R. S. 1894 Ind.
In re Tyler 149 U. S. 164 and case there cited.

ARGUMENT.

THE CIRCUIT COURTS OF INDIANA HAVE EXCLUSIVE ORIGINAL JURISDICTION IN ALL PROBATE MATTERS.

The circuit courts of Indiana have not only *original* jurisdiction, but their jurisdiction is *exclusive* in all probate matters and contests of wills.

Section 2365, R. S. 1894, reads as follows:

"The circuit courts of the state shall have exclusive original jurisdiction of all matters relating to

the probate and contest of last wills and testaments, the granting of letters testamentary and of administration, and the settlement and distribution of decedent's estates. The court granting the letters shall have exclusive jurisdiction of all matters touching the settlement and distribution of the estate whereon said letters shall have been granted."

THE GENERAL POLICY OF THE INDIANA STATUTES IS TO APPOINT RESIDENTS AS ADMINISTRATORS AND EXECUTORS.

Section 2379, R. S. 1894, provides that if there is no executor named in the will, or if the executor or residuary legatee fails to qualify, then an administrator with the will annexed shall be appointed under the same regulations as in granting letters of administration in the case of intestacy; and section 2380, R. S. 1894, provides that letters of administration, in case the widow or next of kin fail to qualify, shall be granted to some one within the state. This section is further modified by the act of March 9, 1901 (Acts of 1901, p. 281), so as to provide that if any administrator removes from the state, it shall authorize the court to vacate his trust as such administrator.

So that it has come to be the law in Indiana that a nonresident may not be appointed administrator within the state; and it is an open question whether a nonresident is eligible to act as an executor in Indiana.

The standard authority in Indiana on the probate law of this state is Henry's Probate Law and Practice. Section 41 of the second edition of this work contains the following:

> "It is not directly so decided, but the inference may be plainly drawn from the authorities, that a nonresident is ineligible to act as an executor of an estate in this state."

We only cite these authorities to answer appellant's statements that nonresidents may as of right qualify as an executor in Indiana. We do not raise the question of the validity of the appointment of Gallup as executor, but only to show the general policy of the Indiana law on the right of nonresidents to qualify as executors and administrators.

ALL CLAIMS AGAINST ESTATES MUST BE FILED WITH THE COURT HAVING JURISDICTION OF THE ESTATE, AND NO INDEPENDENT ACTION IS ALLOWED.

The Indiana statute distinctly provides how every claim against an estate must be filed, and positively prohibits any independent action. So much of section 2465, R. S. 1894, as is pertinent is here copied:

> "No action shall be brought by complaint and summons against an executor or administrator of an estate for the recovery of *any claim against a decedent*, but the holder thereof, whether such claim be due or not, shall file a succinct and definite statement thereof in the office of the clerk of the court in which the estate is pending."

THE FILING OF A CLAIM IS THE COMMENCEMENT OF THE ACTION AND IS ITSELF NOTICE TO THE EXECUTOR.

It is not necessary to give any other notice except to file the claim. This is all covered by statute, and the filing of the claim is ipso facto notice to the executor.

Section 2473, R. S. 1894, fully states the law in Indiana:

> "Immediately upon the filing of a claim against an estate the clerk shall enter the same in the claim docket of the estate under the appropriate headings; and if the same as shown by the statement thereof be secured by a lien, the clerk shall briefly note the kind of lien upon such docket. The filing of the claim and entry thereof upon the claim docket shall be deemed the commencement of the action upon such claim, and *shall be all the notice necessary to be given to the executor or administrator of the pendency of the action.*"

The treasurer of Marion county, however, did not stop here, but caused Gallup, executor, to be personally served with notice of the claim while he was in Indianapolis preparing to close up the estate, and Gallup, as executor, appeared in person and by counsel. So that more was done than was necessary under the statute.

ADMINISTRATORS AND EXECUTORS, BY OPERATION OF LAW, BECOME PARTIES TO CLAIMS FILED AGAINST ESTATES, AND ARE BOUND TO TAKE NOTICE OF THE FILING OF SUCH CLAIMS WITHOUT SUMMONS OR OTHER NOTICE.

The section of the Indiana statute last above quoted is very plain.

The supreme and appellate courts of Indiana, construing this section and the section previously quoted respecting the jurisdiction of the circuit court, have emphasized the proposition that no notice other than the filing of the claim is necessary. In the case of Taggart, administrator, v. Te-

vanny, 1 Ind. App. 239, the appellate court say, on page 346:

> "As we have already seen the statute provides that there shall be neither complaint nor summons, but that the statement shall be filed in the office of the clerk. When this is done the claimant has done all that the law requires of him. It is not necessary to formally make the administrator or executor a party. When the claimant states his claim, the administrator or *executor is made a party by operation of law, and he is bound to take notice of the filing of such claim.*"

In that case the administrator, as in the case at issue, appeared and moved to strike out the complaint, and the court, in discussing that proposition and the Indiana practice thereunder, which we submit is controlling here, on page 346 (bottom of page), say:

> "Besides, the administrator made a full appearance to the action in the Clark circuit court and there moved to strike from the files the first and second paragraphs of the complaint. When that motion was overruled, he made an affidavit and application for a change of venue. Hence, *if ever there was any merit in his objection, he waived his right under the same.*"
>
> "Nesbit v. Long, 37 Ind. 300."

The appellate court of Indiana, in the recent case of Bowman, administrator, v. The Citizens' National Bank, 25 Ind. App. 38, again construe this section. All of the pre-

vious decisions thereon were reviewed in an unanimous opinion of the court. On page 42, the court say:

> "The proceeding was initiated against the estate by the filing of the claim and its entry on the appearance docket as required by the statute. When these things had been done the action was commenced; and it was not necessary in the statement of the claim so filed and entered to name the administrator. *He became a party by operation of law, and was bound to take notice of the filing of the claim without summons or other notice.*"

A GENERAL APPEARANCE BY E EXECUTOR OR ADMINISTRATOR WAIVES ALL IRREGULARITIES AND GIVES THE COURT FULL JURISDICTION OF THE CLAIM.

In the case of Sanders, admx., v. Hartge, 17 Ind. App. 243, objection was made that the claim was not properly on the issue docket for trial. But there, as here, the administratrix appeared and demurred to the complaint, and other proceedings were had, and the court, on page 249, discussing this question, say:

> "But it matters not whether this claim reached the issue docket according to the provisions of the statute, for the appellant entered a general appearance, and thus waived any possible irregularity."

This question was again before the appellate court of Indiana in the Bowman case, supra, and that court, on page 53, in discussing jurisdiction over the administrator, held that, as the administrator was bound to defend the claim,

and he appeared and did defend, all irregularities were waived.

The supreme court of Indiana likewise construes these sections in the case of Stapp, administrator, v. Messeke, 94 Ind. 423, and on page 424 use this language, referring to an executor:

> "He may make a full appearance and demur or answer, and the court will have full jurisdiction, and the parties will be bound by such subsequent pleadings as if they were required by law."

The supreme court again, in the case of Frazer, executor, v. Boss, 66 Ind. 1, in discussing the objection to the allowance of a claim because it had not been properly entered, say, on page 10:

> "But the appellant, without objection, appeared to it and filed a demurrer thereto. He afterward withdrew the demurrer, and moved to strike out the paragraph, but the motion was overruled. This, it is claimed, was error. The circuit court of Kosciusko county had jurisdiction of the subject matter, and the executor, by appearing to the paragraph and filing his demurrer thereto, waived the objection that the claim had not been before filed and placed upon the appearance docket."

In the case of Nesbit v. Long, 37 Ind., p. 302, the court reiterate the proposition:

> "The court had jurisdiction of the subject matter of the suit, and the appearance of the defendant in

> that court, and his motion to publish depositions gave the court jurisdiction of his person. * * * Having thus submitted to the jurisdiction of the justice, he could not afterwards controvert it."

Almost the identical question at issue was presented in the case of Deniston, auditor, v. Terry, 141 Ind. 677. That was a tax assessment by the auditor of omitted property. There, as here, the taxpayer protested against the assessment because of lack of notice and hence want of jurisdiction, but the court, on page 679, fully answer these objections as follows:

> "As to the third reason given for the injunction, that no such notice to appellee as is required by statute was given, we may observe that it is not denied *that some notice was given.* It is further shown that appellee did *appear and protest* against the proposed assessment. * * * ***Where a party has actual notice, and voluntarily enters his appearance to resist a proposed action against him, that is sufficient to confer jurisdiction.***"

Gallup, executor, entered a full appearance, and moved to dismiss the claim for want of jurisdiction, giving three reasons therefor, all of which are abandoned here.

NO HEIR, DEVISEE OR LEGATEE CAN PROVE ANY CLAIM TO AN ESTATE UNTIL ALL CLAIMS AND TAXES ARE PAID AND FINAL SETTLEMENT ACCOUNT HAS BEEN RENDERED.

No heirs, devisees or legatees have any provable interest whatever in the personal property of an estate until after all the debts, including taxes, are paid.

All of this Gallup estate was personal property and, therefore, all in the hands of the court and no part of it in the hands of heirs, devisees or legatees. It is only the surplus, if any, of an estate that goes to the heirs, devisees or legatees.

Section 2562, R. S. 1894, provides that when a final settlement has been made, and notice given to the heirs, devisees and legatees to prove their claim to the surplus, they shall appear and do so.

In the case of Schmidt, treasurer, v. Failey, receiver, 148 Ind. 150, the treasurer demanded taxes due on an estate in the hands of the Marion circuit court of Indiana. These funds had come from different states to be administered upon in Indiana. The receiver denied liability for taxes thereon, but the supreme court use this pertinent language, on page 153:

> "And the fact, too, that nonresidents might have claim to some distributive share of the property on final settlement, whether that property were *in the hands of an administrator, a receiver or other trustee*, could not deprive the state of the right to tax the property before distribution and while still in custody of an *official of the court* having control of such distribution."

Counsel for plaintiffs in error in their brief cynically refer to the opinion of the court in the case at issue using the words "official residence." But the supreme court, in the Schmidt case, supra, decide that an administrator is an *official of the court* and under its immediate personal juris-

diction. In discussing the question of situs of personal property for taxation in Indiana, the court, on page 153, supra, say:

> "Personal property of nonresidents of the state shall be assessed to the owner or to the person having control thereof in the township, town or city where the same may be."

So that in the case at issue, if the personal property was in the custody and control of an administrator or receiver in Indiana, even though the property should eventually go to a nonresident, the administrator, being an *officer of the court*, would be required to pay the taxes on such personal property. The supreme court, discussing the question directly in issue here, on page 154, supra, say:

> "As well might an administrator claim that he ought not to be required to pay the taxes on the money in his hands belonging to the estate of his decedent, for the reason that certain heirs or creditors residing in other states or in other countries would have a right to share in the distribution of such estate on final settlement."

On page 152 of the Schmidt case, supra, the supreme court of Indiana thus disposes of the question of jurisdiction:

> "The simple question left, then, is whether the property in the hands of the receiver is 'within the jurisdiction of this state.' That it is in the hands of a receiver in this state, and subject to distribu-

tion by him on order of the court of *which he is an officer*, would seem to make it *clear that it must be within the jurisdiction of the state.*"

ALL PROPERTY WITHIN THE JURISDICTION OF THIS STATE IS SUBJECT TO TAXATION, AND THIS INCLUDES ALL PERSONAL PROPERTY OF NONRESIDENTS, WHERE SUCH PERSONAL PROPERTY HAS A SITUS IN THIS STATE.

Section 8410, R. S. 1894, reads:

> "All property within the jurisdiction of this state, not expressly exempted, shall be subject to taxation."

The only property exempted is the classes exempted by the constitution, such as property used for literary, scientific purposes, etc.

Section 8421, R. S. 1894, clause 6, covers the taxation of personal property of persons dying in Indiana, and is not only explicit but we insist in controlling in the present case:

> "Personal property of the estates of deceased person in the hands of executors, administrators, or other persons, shall be assessed to the persons in charge of such property, in the township, town or city *where the deceased last dwelt*, until such property has been distributed to the heirs or other persons entitled thereto. If such decedent was a nonresident of the state such property shall be assessed in the township, town or city where situated."

The property is assessed where the deceased last dwelt, not where the executor lives.

Not only personal property of residents, but personal property of nonresidents, where the *situs* of the property is in the state, is taxable in Indiana.

Section 8421, clause 4, provides:

> "Personal property of nonresidents of the state shall be assessed to the owner or to the *person having control thereof*, in the township, town or city where the same may be."

Clause 7 of the above section makes a different provision respecting the assessment of personal property in the hands of a trustee or agent, for it provides that personal property in the hands of a trustee or agent shall be assessed at the *residence of such agent.*

Since Gallup's estate was entirely personal, therefore it must all be assessed *where Gallup died.* And it not only must be assessed at that place, but it also must continue to be assessed there until it is finally distributed to the heirs or persons entitled thereto.

It is the duty of every taxpayer to make a return under oath of his taxables as of April 1st of each year. (See section 8455, R. S. 1894.)

IT IS THE STATUTORY DUTY OF EVERY EXECUTOR TO PAY ALL TAXES DUE FROM THE DECEDENT'S ESTATE: AND IF HE FAILS SO TO DO IT THEN BECOMES THE DUTY OF THE TREASURER TO FILE A CLAIM AGAINST THE ESTATE IN THE CIRCUIT COURT WHERE THE ESTATE IS BEING ADMINISTERED.

Section 8587, R. S. 1894, provides:

> "It shall be the duty of every administrator, executor, guardian, receiver, trustee or person having

the property of any decedent, infant, idiot or insane person in charge, to pay the taxes due upon the property of such decedent, ward or party, and, in case of his neglecting to pay any installment of taxes when due, when there is money enough on hand to pay the same, the county treasurer shall present to the circuit or other proper court of the county, at its next term thereafter, a brief statement in writing, signed by him as county treasurer, setting forth the fact and amount of such delinquency, and such court shall at once issue an order directed to such delinquent, commanding him to show cause within five days thereafter why such tax and penalty and costs should not be paid, and, upon his failing to show good and sufficient cause for such nonpayment, the court shall order him to pay such tax out of the assets in his hands belonging to the estate of said decedent, ward or other person; and such delinquent shall not be entitled to any credit, in any settlement of said trust, for the penalty, interest and cost occasioned by such delinquency, or by the order to show cause, but the same shall be a personal charge against him, and he shall be liable, on his official bond, for such penalty, interest and costs."

Section 2534, R. S. 1894, respecting the settlement of decedents' estates and the payment of debts, provides, after expenses of administration and funeral expenses and expenses of last sickness, there shall be paid "taxes accrued upon the real and personal estate of the deceased at his death, and taxes assessed upon the personal estate during the course of the administration."

Here is the positive mandate of the statute ordering executors to pay all taxes of the decedent, and the further statute making taxes payable next after the costs of administration and the expenses of the last sickness and the funeral. They are paid by statute before any other debts, either secured or unsecured, or any legacies or devises or gifts; they supersede all.

If the executor fails to pay the taxes, then it is the duty of the treasurer to file a claim for those taxes in the court where the executor was appointed. And when this is done it is the duty of the executor to appear in such court; and this brings us to the next proposition.

ADMINISTRATORS AND EXECUTORS ARE OFFICERS OF THE COURT AND WITHIN ITS JURISDICTION, AND MUST, WITHOUT NOTICE, APPEAR TO SUCH CLAIMS FOR TAXES.

The latter part of section 2473, R. S. 1894, provides:

> "The filing of the claim and entry thereof upon the claim docket shall be deemed the commencement of the action upon such claim, and *shall be all the notice necessary to be given to the executor or administrator of the pendency of the action.*"

On page 154 of the Schmidt case, supra, the supreme court of Indiana say:

> "Taxes are not only a lien upon trust funds in court, but they are the first and paramount lien, to be paid before any other lien or claim whatsoever, except it be the costs of court."

Further along the court declares that the actual *situs* of the personal property, even though the property be owned by nonresidents, if it is under the control of an administrator or receiver in Indiana, is in Indiana, and it must be taxed there.

> "A nonresident who sends money into this state and surrenders its possession and control to agents fully authorized to loan, invest and manage the same, thereby subjects such property to the jurisdiction of this state for the purpose of taxation; and the fiction as to the *situs* of the property yields to the requirements of justice, and the actual situs is the place where the property is actually situated."

And further along on page 155, the court quotes Judge Storey in his Conflict of Laws (section 550), where this plain language is used:

> "A nation within whose territory any personal property is actually situated has an entire dominion over it while therein, in point of sovereignty and jurisdiction as it has over immovable property situate there."

The court then quotes from Justice Blachford (23 Fed. Cas. 21) as follows:

> "There is no sound principle upon which the property of a person or a corporation which is placed in the hands of a receiver by a court of jus-

> tice for the purposes of a suit pending in said court, can be regarded as being thereby rendered exempt from the operation of the tax laws of the government within whose jurisdiction such property is situated."

The precise question here stated was passed upon by the supreme court of Indiana in the case of Reynolds, auditor, v. Bowen, administrator, 138 Ind., p. 434. This was an omitted tax case where the auditor had made an assessment, and the executor had refused to pay same, and made all the defenses possible. He appeared before the auditor and moved to set aside the notice, and also appeared and moved to strike from the tax duplicate the assessments. In fact, the plan followed in the case at issue was much similar to the plan laid down by Bowen, administrator, in that case.

As if referring to the case at issue, the court, on page 442, say:

> "The appellee makes no pretense that the assessment was fair or just, or that the decedent had in fact given in all his property for taxation. He says, in effect, to the state: 'The thing is done, and what are you going to do about it?' "

Further along on page 446, this pertinent language appears:

> "It is urged that the law does not authorize notice to the administrator as to omissions of property

from assessment made by a decedent. The property alleged to have been omitted in this case is personal property. On the death of the owner the law puts this class of property in the hands of an executor or administrator, who is made the personal representative of the decedent. * * * The statute provides for notice to the person claiming to own such property, or occupying it, or in possession thereof, if he resides in the county and is not present. Notice to any one but the administrator would have been insufficient. *But the administrator was present; he appeared and answered; no other notice was necessary.*"

Then passing to the subject of irregularities in assessments and notices, etc., the court continues:

> "Irregularities do not affect the correctness of a tax assessment, provided the proceedings are substantially correct, and the assessment is fair and just."

In the case at issue the plaintiff in error raises no question whatever about the justness of the assessment or the correctness of the amount, or that for years the deceased had systematically made false returns under oath. Nor is it denied that the claim is just and fair. Therefore, the executor Gallup being personally notified in a proper way by a proper officer, and being present in person and by counsel, and filing motions, demurrers and answers, he certainly was within the jurisdiction of the court, and no other

notice was necessary; and the claim being just and fair the cause ought to be affirmed.

As if referring to the case at issue, the court, on page 448, supra, say:

> "If there is any class of property more than another which that law sought to have returned and appraised at its true cash value, it is such property as is concerned in this suit, and which had for so long a time escaped taxation in the hands of money-lenders, to wit, money, bonds, notes and other credit, and choses in action."

We commend the language of the court, on page 454, supra, as particularly applicable to the present case:

> "There is no claim in this case that the property omitted was ever assessed, none that right and justice do not require that it should be assessed the same as any other property in the state. The argument is not as to the merits of the case, but only that certain technicalities were not fully observed in placing the property upon the duplicate. The property being upon the duplicate, the presumption is that it is correctly there. No taxes are void for mere irregularities in assessment, if there should be any, provided there is a substantial compliance with the statute."

In the case of Gallup, executor, v. Schmidt (the case at issue), 154 Ind. 196, the supreme court, construing the Indiana statute, say, on page 202 (record, p. 40):

> "The jurisdiction of the circuit court over its executor will not be controverted, even though his personal residence is in New Hampshire. He was ordered by the court to show cause, if he had any, why he did not pay the taxes. In response to the order any defense he had or ever had was open to him."

Further along on the same page, the court say:

> "Moreover, the right to tax property is a sovereign right, reserved to the jurisdiction charged with the duty of its protection. * * * This had been done by public laws, of which all persons, residents and nonresidents alike, must take notice and conform thereto without special summons. The state can not be deprived of the tax because the owner is a resident of another state."

All this is discussing the proposition as if the owner were a resident of another state. The owner in the case at bar was not a resident of another state. The owner died, as he lived, a resident of Indianapolis, Indiana, and there was no other owner of personal property until after the estate had been distributed. This question has been fully discussed in this brief.

The entire personal estate was in the hands of the court, subject to its order and control. For all that the court might know, claims sufficient to more than consume all of

the estate might be presented, and there would be nothing left for distribution to any heir, devisee or legatee, as is frequently the case. No presumptions can be indulged in in favor of any distribution; and the positive language of the statute, and the clear construction thereof by the courts of the state determines that until there has been a final settlement of the personal estate all taxes accrued and accruing are to be paid prior to any distribution whatever either to claimants, heirs, legatees or devisees.

EXECUTORS MAY CONTEST ASSESSMENT OF OMITTED TAXES IN THE CIRCUIT COURT WHEN THE TREASURER FILES CLAIM THEREFOR, AND THIS AFFORDS "DUE PROCESS OF LAW," EVEN THOUGH NO APPEARANCE WAS ENTERED OR SERVICE HAD WHEN THE ASSESSMENT WAS MADE BY THE AUDITOR.

Section 8586, R. S. 1894, has been heretofore quoted in this brief. After defining the solemn duty of an executor to pay all taxes, yet if he fails to do so, then it is made the duty of the county treasurer to file a claim therefor with the circuit court, serve notice upon the executor, who is required within five days to show cause why the claim should not be paid.

The case of Deniston, auditor, v. Terry, 141 Ind. 677, was a case arising out of the assessment of omitted property. The appellee filed a written protest against placing the assessment upon the duplicate, but there, as here, the assessment was made, and after failing to have the assessment stricken from the duplicate, filed a bill for injunction. On page 679, the court, referring to the appearance of the taxpayer and his filing a protest, say:

> "It is further shown that appellee did appear and protest against the assessment. * * * ***Where a party has actual notice, and voluntarily enters his appearance to resist a proposed action against him, that is sufficient to confer jurisdiction.***"

In the case at issue, the supreme court of Indiana, construing the Indiana tax laws, together with the laws concerning the settlement of decedents' estates, all with reference to what is due process, say, on page 202 (record, p. 40):

> "It is no longer an open question in this state that if a party against whose property an assessment has been made is at any time in the course of the proceeding before a conclusive judgment afforded by law an opportunity to contest its correctness, he is accorded due process of law within the meaning of the fourteenth amendment."

What is due process of law with respect to a tax or assessment has never been better stated than in the leading case of Davidson v. New Orleans, 96 U. S., p. 97. On page 104 appears this language:

> "That whenever, by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in re-

gard to the property as is appropriate to the nature of the case, the judgment in such proceedings can not be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

And further along, on page 105, Justice Miller, speaking for the court, says:

"But however this may be, or under whatever other clause of the federal constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case. This was clearly stated by this court, speaking by the Chief Justice, in Kennard v. Morgan (92 U. S. 480), and, in substance, repeated at the present term, in McMillen v. Anderson, 95 id. 37.

"This proposition covers the present case. Before the assessment could be collected, or become effectual, the statute required that the tableau of assessments should be filed in the proper district court of the state; that personal service of notice, with reasonable time to object, should be served on all owners who were known and within reach of process, and due advertisement made as to those who were unknown, or could not be found. This was complied with; and the party complaining here appeared, and had a full and fair hearing in the court of the first instance, and afterwards in the supreme court. If this be not due process of law, then the

words have no definite meaning as used in the constitution."

In the state Railroad Tax Cases, 92 U. S. 575, admittedly the most exhaustive discussion of the tax question to be found, on page 613, this court say:

> "It is founded on the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully other instrumentalities and other modes of procedure are necessary, than those which belong to courts of justice."

DUE PROCESS OF LAW IS PROCESS ACCORDING TO THE LAW OF THE LAND AND THIS PROCESS IN THE STATES IS REGULATED BY THE LAW OF THE STATES.

This court, in quite a recent case, discussing due process and of what it consists, in the case of Allen v. Georgia, 166 U. S. 138, laid down a clear rule respecting what is due process when applied to the laws of the states. On page 140, the court, speaking through Justice Brown, say:

> "Without attempting to define exactly in what due process of law consists, it is sufficient to say that if the supreme court of a state has acted in consonance with the constitutional laws of a state and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test.

> The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizens to justify our interference."

What fundamental right has Gallup, executor, been deprived of? He is an executor by grace of the court and the law of the state. He is nothing but the officer of the court; the arm of the court in disposing of the personal property of Gallup, the deceased, whose property by the statute of Indiana is within the sole, original and exclusive jurisdiction of the circuit court. He has had no fundamental rights taken from him; it is not his property; it is the estate of the decedent, and that estate is in the hands of the court, and Gallup, executor, stands in the shoes of Gallup, deceased, and the estate of Gallup, deceased, is within the sole and exclusive jurisdiction of the circuit court of Marion county, Indiana, which court, and the supreme court, both have held that due process of law has been afforded, not only the estate of Gallup, deceased, but of the executor, and that such process is in strict accordance with the laws and constitution of Indiana.

This court, in a still later case, that of Wilson v. North Carolina, 169 U. S. 586, speaking through Justice Peckham, on page 593, say, with reference to a certain procedure in North Carolina:

> "The procedure was in accordance with the constitution and laws of the State. It was taken under a valid statute creating a state office in a constitutional manner, as the state court has held. What

kind and how much of a hearing the officer should have before suspension by the governor was a matter for the state legislature to determine, having regard to the constitution of the state."

And on page 596 this language appears:

"The jurisdiction of this court would only exist in case there had been by reason of the statute and the proceedings under it such a plain and substantial departure from the fundamental principles upon which our government is based, that it could with truth and propriety be said that if the judgment were suffered to remain the party aggrieved would be deprived of his life, liberty and property in violation of the provisions of the federal constitution."

It must be a plain and substantial departure from the fundamental principles, not an imaginary and technical departure, if any.

The case of Pittsburg, etc., Railway Company v. Backus, treasurer, 154 U. S. 421, was an Indiana tax case, and the opening sentence of the court, speaking through Justice Brewer, is directly applicable, on page 425:

"The decision of the supreme court of the state (Indiana) removes from this case all questions of conflict between the act and the constitution of the state, and the only matter remaining for our consideration is whether there is in the act as administered any trespass upon rights which the federal constitution secures to the plaintiff. Notwithstanding the

> elaborate attack made both in brief and argument upon this act, it seems to us that its constitutionality has been practically settled by decisions of this court, especially those in State Railroad Cases (92 U. S. 575) and the Kentucky Railroad Tax Cases (115 U. S. 321). * * * A sufficient answer to this is, that the decision of the supreme court of Indiana in this case is conclusive upon us that the constitution of that state authorizes just the method of assessment adopted in this case."

And, further, on page 426:

> "A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important is all that can be adjudged vital. Rehearings and new trials are not essential to due process of law, either in judicial or administrative proceedings."

Almost the last sentence in the celebrated State Railroad Tax Cases (92 U. S. 575) is one that meets this entire question. Justice Miller, speaking for the court, there, page 618, says:

> "As the whole matter then concerns the validity of a state law as affected by the constitution of the state, that question and the other one of the true construction of that statute belong to the class of questions in regard to which this court holds with some few exceptions, that the decisions of the state courts are to be accepted as the rule of decision for the federal courts."

In Walker v. Sauvinet, 92 U. S., p. 90, the federal question attempted to be raised was the right to demand a trial by jury, which the state court had denied. Chief Justice Waite, speaking for the court, on page 93, defines due process of law in the states:

> "Due process of law is due process according to the law of the land. This process in the states is regulated by the law of the state. Our power over that law is only to determine whether it is in conflict with the supreme law of the land; that is to say, with the constitution and laws of the United States, made in pursuance thereof, or with any treaty made under the authority of the United States. Here the state court has decided that the proceeding below was in accordance with the law of the state, and we do not find that to be contrary to the constitution or any law or treaty of the United States."

DUE PROCESS OF LAW IS AFFORDED A LITIGANT IF HE HAS AN OPPORTUNITY TO QUESTION THE VALIDITY OR THE AMOUNT OF AN ASSESSMENT OR CLAIM OR CHARGE AGAINST HIM AT ANY TIME BEFORE THE AMOUNT IS DETERMINED, OR AT ANY SUBSEQUENT PROCEEDINGS FOR ITS COLLECTION, OR AT ANY TIME BEFORE FINAL JUDGMENT IS ENTERED.

The above proposition is clearly defined by this court in the case of Winona Land Company v. Minnesota, 159 U. S., p. 526. On page 537 the court, speaking through Justice Brewer, defines the law to be as follows:

> "He is, therefore, notified and given an opportunity to be heard before his property is taken from him. Questions of this kind have repeatedly been before this court and the rule in respect thereto

> often declared. That rule is that a law authorizing the imposition of a tax or assessment upon property according to its value does not infringe that provision of the fourteenth amendment to the constitution, which declares that no state shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity or the amount of it either before that amount is determined *or in subsequent proceedings for its collection.*"

Further along, discussing different modes of assessment, the court, on page 538, say:

> "So that the difference between the two modes of assessment may be stated thus: In the one case there is an assessment by one officer, with the right to review his action; in the other there is an assessment by a different officer, and no provision for review except as the matter comes before the court in a proceeding for the collection of taxes. But there is nothing in this difference to affect the constitutional rights of the parties. The legislature may authorize different modes of assessment for different properties, providing the rule of assessment is the same."

In the case of the Missouri Pacific Railway Company v. Humes, 115 U. S. 512, this language appears, on page 520:

> "If the laws enacted by a state be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of

> those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice and oppressive character of such laws will not invalidate them as affecting life, liberty or property without due process of law."

This proposition was again plainly stated by this court in the case of Spencer v. Merchant, 125 U. S., p. 345. At page 356 this decisive language appears:

> "If the legislature provides for notice to and hearing of each proprietor at some stage of the proceedings upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law."

Again, in the case of Lent v. Tillson, 140 U. S. 316, the same principle is well defined by this court in an opinion by Justice Harlan, the language appearing at the bottom of page 328:

> "When the inquiry is whether a state enactment under which property is proposed to be taken for a public purpose accords full opportunity to the owner, at some stage of the proceedings involving his property, to be heard as to their regularity or validity, we must assume that the inferior courts and tribunals of the state will give effect to such enactment as interpreted by the highest courts of that state."

In the case of Palmer v. McMahan, 133 U. S. 660, this court, on page 669, treating of this same matter in a tax case, there say:

> "The power to tax belongs exclusively to the legislative branch of the government; and when the law provides for a mode of confirming or contesting the charge imposed, with such notice to the person as is appropriate to the nature of the case, the assessment can not be said to deprive the owner of his property without due process of law."

In the case of Paulson v. Portland, 149 U. S., p. 30, the same proposition is stated, on page 41:

> "It is settled that if provision is made for notice to and hearing of each proprietor at some stage of the proceedings upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property with due process of law."

In that case there was lack of express provision in the ordinance making the assessment, but the court, on page 42, meet that question in these words:

> "Notwithstanding the doubt arising from the lack of express provision for notice in ordinance 5068, it can not be held, in view of the notice which was given, of the construction placed upon this ordinance by the council thereafter, and of the approval by the supreme court of the proceedings as in conformity to the laws of the state, that the provisions of the federal constitution requiring due process of law have been violated."

The supreme court of Indiana has had this question befor it several times.

In the case of Johnson, surveyor, v. Lewis, 115 Ind. 490, the supreme court, on page 492, say:

> "It is quite true that the constitution sanctions no law under which a lien can be conclusively imposed upon property without first giving the owner notice and affording him an opportunity to be heard in some tribunal competent to administer adequate relief. But it is also true that it is competent for the legislature to prescribe the kind of notice and the time when it shall be given as well as the tribunal before which the hearing may be had."

This question came before the supreme court of Indiana in the case of Kiser v. The Town of Winchester, 141 Ind. 694 on an assessment for improvements. The court, on page 696, discussing this question, say:

> "While it is true that neither the state nor the federal constitution will give its sanction to a law under which a lien can be conclusively imposed upon property and the title of the owner divested without first giving him notice and affording him an opportunity to be heard in some tribunal competent to administer adequate relief, nevertheless it is also true, and firmly settled, that it is competent for the legislature, and it has the right, to prescribe the kind of notice and the time when it shall be given, as well as the tribunal before which the hearing may be had."

In the case at bar, the supreme court of Indiana again, in a tax case, pass upon the same question. In 154 Ind., p. 202 (printed record, p. 40), the court say:

> "It is no longer an open question in this state, that if a party against whose property an assessment has been made is, at any time in the course of the proceedings before a conclusive judgment, afforded an opportunity to contest its correctness, he is accorded due process of law within the meaning of the fourteenth amendment."

Counsel for plaintiff in error cite, and seem to rely upon, the case of Scott v. The City of Toledo, 36 Fed. Rep. 385. That was a case of an injunction to restrain the city from enforcing an ordinance authorizing the appropriation of land and the assessment of the costs thereof. That was before any enforcement of the assessment was attempted. In that case the common council of the city of Toledo made the assessment *without notice or a method for a hearing*, and had the right to enforce collection by distraining and selling the property *without notice;* and thus deprived the citizen of his property without due process of law.

Furthermore, that was a case between private parties, not the case of an executor who in law is always present in the court of his appointment to respond to demands against his trust, and hence the case is not at all in point, because in the case at issue the claim had to be filed in court.

It is sufficient to say in answer to that case, that the same court, in passing upon precisely the same sections of the statute, two years later in the case of Murdock v.

The City of Cincinnati, 44 Fed. Rep. 726, held that where a suit had been brought to enforce the assessment, and proceedings were taken thereunder, and notice served, and issue joined, that such proceedings were not wanting in due process of law. This later case arose in a suit to enforce the lien in court, and Judge Jackson, on page 729, says:

> "It now appears that the city of Cincinnati is proceeding by civil suit in the state court against the complainant to collect the assessments in question. To that suit complainant may interpose any and all defenses going either to the validity or regularity of said assessments. Said suit gives him a full opportunity to be heard, and affords him the privilege of presenting every objection that can possibly be made, either under the constitution of the United States or under the constitution and laws of Ohio, to the validity of the assessments. It can not be questioned that the judgment which may be rendered against complainant in said suit will constitute due process of law."

In that case the statute of Ohio distinctly allowed the option of collecting an assessment by suit or by distraint and sale. In the case at issue the claim must be filed with the court. In that case private persons were parties. In the case at bar an executor, the officer of the court, is the party, *and a court too that has sole, original and exclusive jurisdiction of the entire estate.*

Plaintiff in error in the case at issue contends that there is cumulative remedy in the hands of the treasurer to collect taxes; that thereby this proceeding was wanting in due

process. They entirely forget the statute that makes it mandatory upon the part of anyone having a claim against an estate to present such claim, and further that Gallup, the executor, was an officer of the court, bound to obey its order and remain subject to its commands; and, further, that a claim was filed, issues were joined, Gallup, executor, did appear, trial was had, judgment was rendered, and that judgment was affirmed by the supreme court. It is difficult to imagine how due process of law warrants any further rights.

A REVENUE LAW OF A STATE WILL BE IN HARMONY WITH THE FOURTEENTH AMENDMENT, ALTHOUGH SUCH LAW DOES NOT FURNISH AN OPPORTUNITY TO BE PRESENT WHEN THE TAX IS ASSESSED, WHEN THAT TAX SHALL BE COLLECTED BY SUIT.

> If a taxpayer has a right to enjoin a collection, this is due process of law.

We call the court's especial attention to the case of McMillen v. Anderson, 95 U. S., p. 37. Here, it seems to us, is a case that covers the case at bar like a blanket. This was a tax case, and the defense was made that due process of law was not afforded. On page 42, the court answer fully the statement of counsel for plaintiff in error, *that at the time the tax is assessed there must be an opportunity to be present and to be heard:*

> "It seems to be supposed that it is essential to the validity of a tax that the party charged should have been present, or had an opportunity to be present,

in some tribunal when he was assessed. But this is not, and never has been, considered necessary to the validity of a tax. And the fact that most of the states now have boards of revisers of tax assessments does not prove that taxes levied without them are void."

Continuing, the court, speaking through Justice Miller, with reference to the right to recover taxes illegally paid as a remedy, say:

> "Nor is the person charged with such a tax without legal remedy by the laws of Louisiana. It is probable that in that state, as in others, if compelled to pay the tax by a levy upon his property, he can sue the proper party and recover back the money as paid under duress, if the tax was illegal."

Further, if this tax was wholly illegal, as counsel for the plaintiff in error in the case at issue contend, then injunction would lie unquestionably against the assessment, and this question is also passed upon in the McMillen case, supra, where the court, on page 42, says:

> "But however that may be, it is quite certain that he (the taxpayer) can, if he is wrongfully taxed, stay the proceedings for its collection by process of injunction."

But the court does not stop there. Even though such injunction would cause expenditure of money and bonds for costs, still that remedy affords due process of law if the

assessment is wholly illegal as is claimed here, as the court proceeds to say in the case cited:

> "It can hardly be necessary to answer an argument which excludes from the definition of due process of law, all that numerous class of remedies in which, by the rules of the court or by legislative provisions, a party invoking the powers of a court of justice is required to give that security which is necessary to prevent its process from being used to work gross injustice to another."

If, therefore, the assessment was wholly illegal, as plaintiff in error claims, because no notice of the proposed assessment was afforded by statute to the nonresident executor, still he had his remedy by injunction, and this was due process of law.

BUT THE ESTATE OF WILLIAM P. GALLUP IS NOT A NONRESIDENT ESTATE; IT IS A RESIDENT ESTATE. HENCE, THE NON-RESIDENCE OF AN EXECUTOR IS OF NO POSSIBLE MOMENT WHERE THE COURT HAS SOLE ORIGINAL EXCLUSIVE JURISDICTION OF THE ENTIRE ESTATE, AND OF WHOSE COURT THE EXECUTOR IS AN OFFICER.

This proposition is thoroughly discussed in the case at issue. (See opinion, record, p. 40.)

As was pointedly decided in the case of Schmidt, treasurer, supra, receivers and executors are officers of the court, and are exclusively within the jurisdiction of the same. The sections of the statute of Indiana heretofore quoted bring such estate solely within the jurisdiction of the court, and constitute its executor an officer thereof, who

is always officially present in court to answer to all claims and demands filed against the estate, and all pursuant to a statute which specifically provides that no notice shall ever be served upon the executor, but that he shall answer and defend against the same.

LAWS ARE TO BE CONSTRUED LIBERALLY IN AID OF THE TAXING POWER, AND ALL TAXES ARE PRESUMED TO BE VALID UNTIL THE CONTRARY IS AFFIRMATIVELY SHOWN, AND NO IRREGULARITIES WILL INVALIDATE THEM THAT DO NOT AFFECT THE MERITS OF THE CASE.

Section 8642, R. S. 1894, reads as follows:

> "And all taxes assessed upon any property in this state, shall be presumed to be legally assessed until the contrary is affirmatively shown."

This section has been construed frequently by the supreme and appellate courts of Indiana.

In the case of Hunter Stone Company v. Edward, 152 Ind., p. 474, the court, on page 478, say:

> "Nothing will discharge the state's claim but actual payment, and the general law must be liberally construed in aid of the taxing power."

In the case of Reynolds, auditor v. Bowen, administrator, also a tax case, the supreme court of Indiana, in 138 Ind., p. 441, say:

> "The power to assess is a summary power; and, to secure uniform and just taxation, and protect the revenues of the state, both as to unscrupulous and

dishonest evasion of the law, and also in the interests of honest taxpayers, it is necessary that *assessment statutes should be liberally interpreted in aid of the taxing power.*"

ANY STATUTE THAT DIRECTS A TAX OFFICER TO SEIZE FOR TAXES, PERSONAL PROPERTY IN THE HANDS OF THE COURT, IS UNCONSTITUTIONAL AND VOID.

Counsel for plaintiff in error insist that section 171 of the tax law of Indiana permits a county treasurer to levy upon property of the estate of any decedent for delinquent taxes, and, therefore, a case *might* arise where due process of law would not be afforded because the tax officer *might* seize the property instead of filing a claim in court. Said section is as follows, being section 8589, R. S. 1894:

> "Nothing herein contained shall prevent the county treasurer from levying upon and selling the property of the estate of any decedent or any ward or person whose property is held in trust by another for the payment of any delinquent taxes in the same manner as other property is sold to pay delinquent taxes and the remedy given to the county treasurers by the provisions of this act shall be regarded as only cumulative, but every person holding property, either as executor, administrator, guardian, or in any other representative or fiduciary capacity, who shall neglect or refuse to pay the taxes listed and due thereon, shall be liable in an action to the heirs of such decedent, or to such ward cestui que trust, for any damages sustained by such neglect or refusal."

It is doubtful if this action authorizes or attempts to authorize a county treasurer to seize any of the personal property in the hands of a court. No case has appeared in either the supreme or appellate court reports of Indiana nor in any printed nisi prius report where any tax officer of Indiana has ever attempted to levy upon any property in the hands of an executor for the payment of taxes; nor does the plaintiff in error cite any similar case and, therefore, it is not at all important in this case.

But assume that it was true, and assume, further, that that section did attempt to authorize a tax officer to levy on the personal estate of a decedent in the hands of an exector, such a law would be unconstitutional and void and such attempt would be enjoined. Property once in the hands of the court can not be seized by an administrative officer, and any attempt to do that would be a contempt of court, and any such law would be unconstitutional and void.

The executive or administrative is a co-ordinate branch with the judiciary, and when the judiciary once seizes property and takes it into its possession it no longer is subject to seizure by any other department of the government. The only remedy is to file the claim with the court having jurisdiction of the estate.

It is not only true of the estate of the dead but also of the estates of bankrupts where receivers are appointed. A great many decisions might be quoted.

The whole question here presented was very fully discussed and decided by this court in the case of In re Tyler,

149 U. S., p. 164. That decision not only has been quoted and followed by all the federal courts throughout the country, but also by the supreme courts of all the states in the Union where the question has been presented. Indeed it has become a part of the common law of this country. There, the receiver had possession of property and a tax officer attempted to seize the same for taxes under a statute. It was contended that taxes being a paramount claim, could be collected by levy on the property in the hands of the court. In that case it was decided:

First (page 181):

> That the court had jurisdiction of the entire subject of litigation.

Second (page 181):

> "No rule is better settled than when a court has appointed a receiver, his possession is the possession of the court for the benefit of the parties to the suit and all concerned, and can not be disturbed without the leave of the court, and that if any person without leave intentionally interferes with such possession, he necessarily commits a contempt of court, and is liable to punishment therefor."

Third (page 182):

> "The general doctrine that property in the possession of a receiver appinted by court is in *custodia legis*, and that unauthorized interference with such possession is punishable as a contempt, is

conceded; but it is contended that this salutary rule has no application to the collection of taxes. * * * But it does not justify a physical invasion of such custody and a wanton disregard of the orders of the court in respect of it."

Fourth (page 183):

"The maintenance of the system of checks and balances characteristic of republican institutions requires the co-ordinate departments of the government, whether federal or state, to refrain from any infringement of the independence of each other; and the possession of property by the judicial department can not be arbitrarily encroached upon save in violation of this fundamental principle."

Fifth (page 183):

"The levy of a tax warrant, like the levy of an ordinary *scire facias*, sequesters the property to answer the exigency of the writ; but property in the possession of a receiver is already in sequestration, already held in equitable execution, and while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done, and the seizure of the property against its will can only be predicated upon an assumption that the court will fail in the discharge of its duties, an assumption carrying a contempt upon its face."

Sixth (page 183):

> "Under these circumstances it was not admissible for a collector to step in, and by a summary distress and sale divest the court of its jurisdiction, and transfer the question of title to another tribunal."

Then, taking up the duty of tax officer, it clearly defines the same to be what the tax officer in the case at issue did:

Seventh (page 184):

> "His plain and obvious duty was to apply to the court for the payment of the taxes due, and as they had full power, the presumption is, that they would have directed their payment through their agents, the trustees, in a manner that would have occasioned no unnecessary delay, while at the same time the rights of all interested would have been properly protected."

It is the uniform rule of the supreme courts of the various states cited in the foregoing opinion, that no levy can be made by any tax officer pursuant to any state statutes where such property is already in the hands of the court; and any such attempt would be in contempt of court, and any such statute would be unconstitutional and void.

It is unnecessary to cite a large number of cases. It is sufficient to say that even if this statute, above quoted, attempted to authorize the seizure of property in the court's hands, the thing that seems to so disturb counsel, such an act would be in contempt of court, and the statute authorizing the same would be void. No such attempt was made in the case at issue.

Therefore, the only remedy, legally authorized, by which the tax officer could collect the tax upon the omitted property in question was to do exactly what he did do—file his claim with the court having original exclusive jurisdiction of the entire estate of Gallup, deceased, and there cause issues to be made, trial to be had, judgment to be rendered, with a right of jury trial, and under all the forms of law, with all rights of exceptions and appeals, and writs of error, which was done in this case. This is and was due process of law. There was no other remedy provided. It was a remedy in court, and the only remedy authorized.

Not only that, but the original counsel for plaintiff in error filed their answer, pursuant to the probate statute quoted, on the theory that all claims against an estate must be filed in the circuit court, and the objections there made by the original counsel in the case were that the claim had not been filed according to the law governing the filing of claims against estates. The present counsel for plaintiff in error did not come into the case for more than two years after it began. The very first motion that the original counsel for plaintiff in error made was to dismiss the petition because it did comply with the general statute providing for filing claims against estates (record, pp. 4 and 5).

The record shows that it was not until the present counsel for plaintiff in error came into the case that the present defense interposed was suggested.

The two statutes above quoted, one requiring that all claims against an estate shall be filed against the executor, and prohibiting any independent suit, and the other

statute requiring the county treasurer to file a claim for taxes, are in entire harmony with each other, and with all the other sections of the statute respecting the settlement of decedents' estates, as well as the statutes respecting the collection and assessment of taxes. It would have been the duty of the county treasurer, without any specific tax law, to have presented the claim for taxes to the court having jurisdiction of the decedent's estate. This he did, and it was the only and exclusive remedy. There was a court in which all questions could be adjudicated and all defenses made, and it was the only forum where the county treasurer could go to collect the taxes from the estate of the deceased, and where he did go.

Counsel for plaintiff in error briefly discuss the proposition that there was a denial of equal privileges and immunities in this case.

The foregoing discussion in this case, it seems to us, fully answers all the suggestions appearing in the brief of plaintiff in error. There is no nonresident involved in this case; nor was there any case cited by counsel involving an question kindred to the question here presented. We deem it unnecessary to take up further time in reviewing the cases digested by opposing counsel on that question. It is a sufficient answer to say, that the estate is a resident estate; that the executor was here and was served with personal service in the state and in the county where the estate is pending; and that there was a full, complete and perfect remedy at law in a court of justice and no place else. We further deem it unnecessary to review the digest of cases

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appearing in the brief of plaintiff in error on the subject of official residence, or notice, further, the sneering remarks made with respect to the decision of the present supreme court of Indiana, which court admittedly, man for man, is as learned a court as ever honored the judiciary of any state, and nobody knows this better than the leading counsel for plaintiff in error. It is enough to say that the cases cited by counsel refer to independent actions, and not to claims filed with or against the receiver or against the administrator or executor. It is the universal rule, not only in the state courts, but in the federal courts also, that claims against an insolvent estate in the hands of the court are filed with the court in the matter of the estate or receivership, and that the receiver is bound to take notice of the filing of these claims without any service of process whatever. He is always in court for the purpose of answering claims filed against his trust, and so with executors and administrators, they are always in court to answer any claims filed against their estates and are not required to have service upon them. It is only when an independent suit in equity or action at law is filed in that or another court, that service has to be had; and it is these independent cases that are cited in the digest appearing in the brief of plaintiff in error.

This is a moot court case. The best that can be said of it is that it attempts to raise a question that does not arise on the facts in this case. It is question of what *might be the law under other circumstances.* As was well said by the supreme court in this case (record, p. 40), referring to plaintiff in error:

> "He was in a situation to avail himself of all the rights and privileges he asserts are unjustly denied to non-residents, and, while himself not aggrieved, he will not be permitted to assail a revenue statute on behalf of others who are making no complaint. The courts are open to those only who are injured."

Gallup, the executor, was not injured. From the first inception of this proceeding on up to this court, he has been notified of and been present at every step in the proceeding. Every possible defense has been made, and all hav been abandoned except the one here. That defense is wholly technical. It is not upon the merits of the case. That a large amount of taxes is justly due from this estate is not denied. That the circuit court of Marion county, Indiana, has original exclusive jurisdiction is not questioned. That that court had jurisdiction of this subject matter and of the estate is admitted. The only thing that is challenged is a question of notice of the original assessment, not actual notice, but legal notice.

We humbly submit that this appeal has no merit. If there are irregularities which do not affect the merits of the case nor deprive the estate of that which is not justly

owing, the contention of Gallup, executor, in any event should not be sustained. The state should not have more than it deserves. It should have what it is entitled to. All should bear their burdens alike. William P. Gallup did not bear his share of the public burdens. The laws protected his property. His estate should now make good the amount of those burdens, which he ought to have borne, and which, by his own conduct and acts, he prevented the state from collecting. His executor was attempting to close the estate without the payment of the omitted taxes or any portion of them, and as the trial court found (record, p. 23), he did not make "or attempt to make any provision whatever for the payment of said taxes or any portion thereof, but, on the contrary, was attempting and contriving thereby to defeat the collection of said taxes, and to cause said estate to be finally settled and determined without the payment of said taxes or any portion thereof."

This executor, when prevented from fleeing the state and taking one-half million dollars of assets of his brother's fortune with him, turns and assails the courts of Indiana for compelling him to pay to the state and its subsidiary local governments, a tax which his brother had illegally withheld from the state.

We have fallen into evil ways indeed if, not only tax officers, but the courts themselves, for doing their duty are to be assailed by fugitive taxpayers, the mendicant legatees of rich and tax-owing relatives.

We believe there is no error in the record, and ask that the cause be affirmed with penalties.

Respectfully submitted,

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Attorney for Defendant in Error.

MARTIN M. HUGG, *County Attorney.*
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No. 100.

Add'l Brief of Defendant in Error

Office Supreme Court U.S.
FILED
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JAMES H. McKENNEY

Filed Oct. 24, 1901.

Supreme Court of the United States.

OCTOBER TERM 1901.

File No. 17821.
Term No. 100.

EDWARD P. GALLUP, EXECUTOR OF THE ESTATE OF WILLIAM P. GALLUP, DECEASED,
Plaintiff in Error,
v.
WILLIAM H. SCHMIDT, TREASURER OF MARION COUNTY, INDIANA,
Defendant in Error.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

WILLIAM A. KETCHAM,
Special Counsel for the City of Indianapolis and of the School City of Indianapolis.

The Hollenbeck Press, Indianapolis.

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IN THE

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v.

WILLIAM H. SCHMIDT, TREASURER OF MARION COUNTY, INDIANA,
Defendant in Error.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

I.

STATEMENT OF FACTS.

In remembering a friend, the general countenance is more readily recognized than any detailed description, such as the color of his hair or eyes, the shape of the nose,

NOTE 1.—*All references to the Transcript are to the printed pages.*

NOTE 2.—*The references to the Tax Law of 1891 are to the sections in the Appendix.*

the character of the beard, or even the wart alongside of the nose. The whole, taken in at a glance, gives a much more satisfactory view than the isolated features, and this notwithstanding some of them may be unduly prominent. So in the determination of a question of law, it is quite important and very helpful to see the case in its general features as well as in detail, and this notwithstanding the question to be decided may turn upon a particular feature rather than on the general countenance of the case, and I beg, therefore, to submit a statement of the case as it arose and as it was decided, so that the court may have a knowledge of what the controversy was in the outset, and this will lead up properly to a discussion of the particular and limited questions that are presented by this record, it being a writ of error to the supreme court of Indiana, where nothing is before the court for determination except the federal questions that were presented and decided adversely in the court below.

The plaintiff in error was the executor of the will of William P. Gallup, deceased. The decedent came to Indianapolis prior to the 15th day of April, 1862, and continued a resident of that city until December, 1893, when he died in Indianapolis. (Transcript, p. 17, Finding No. 1.)

At the time of his death he left a personal estate of the value of $492,628.26, consisting principally of stocks, bonds, notes and mortgages, including government bonds (not subject to taxation) appraised at $43,600 and bank stock (assessed and taxed in connection with the bank) of $65,152.20, so that he owned at the time of his death, of personal property subject to taxation, and which he was required to list, amounting in the aggregate to $383,876.06. (Transcript, p. 17, Finding No. 3.)

Between the first of April and the first of June of each year every tax-payer was required to furnish the town-

ship assessor with a list of his personal property subject to taxation. (Appendix, Sec. 48.)

In alleged compliance with this statutory requirement, the decedent, for the year 1893, had returned his personal property for taxation at $20,560, and no more. (Transcript, p. 17, Finding No. 2.)

After his death the plaintiff in error qualified as his executor, and in February, 1894, paid to the then treasurer of Marion county, on account of omitted taxes, the sum of $5,750, and no more, but at the time of making such payment no assessment of the omitted property had been made by any officer authorized to do so, nor had any assessment been reported to the auditor of Marion county, nor was it entered upon the duplicates or other records in the office of the auditor of Marion county. (Transcript, p. 18, Finding No. 6.)

On the 4th of January, 1895, being shortly after the expiration of the year which is allowed for the settlement of decedent's estate under the laws of Indiana, the plaintiff in error filed his final report as such executor, and caused and procured the same to be set for hearing on the 26th of January, 1895, and such final settlement and report was on the 26th of January, 1895, pending for final disposition and settlement of said estate. (Transcript, p. 23, Finding No. 12.) The result of which, if approved, would have been to cut off all claims for omitted taxes.

On the 15th of January, 1895—between the time of the filing of the final report by the executor and the day when it was set for hearing and final action and settlement of the estate—the auditor of Marion county, having discovered and received credible information and having reason to believe that the personal property of the deceased had not been properly assessed for the years 1881 to 1893, inclusive, but that there had been an omission from the

assessment books and tax duplicates for each of said years of the amounts of personal property owned by the decedent, gave to the plaintiff in error, as the executor of the last will and testament of the decedent, written notice of his intention to add the omitted property to the tax duplicates, and requiring him to appear at the auditor's office in the court-house within five days to show cause, if any he had, why the property should not be added to the tax duplicate. (Transcript, p. 18, Finding No. 7.)

This notice was in writing and is set forth *in extenso* in Finding No. 7, at pages 18 and 19 of the Transcript, and was by the sheriff of Marion county, Indiana, duly served upon the plaintiff in error by reading and delivering to him a copy. At the time of such service the plaintiff in error was present in Marion county temporarily, although a resident of New Hampshire, engaged in the settlement of the estate of said decedent, and the notice was served upon him in Marion county. (Finding No. 7, *supra.*)

This notice was served and the subsequent proceedings were had in accordance with the provisions of Sec. 142 of the Tax Law set forth in the appendix hereto.

On the 19th of January, 1895, the plaintiff in error appeared before the auditor in person and by attorney, objecting to the authority of the auditor to act, and filed his answer.

On the 21st of January, 1895 (Transcript, p. 19, Finding No. 8), the plaintiff in error was served with a subpena *duces tecum* to produce the notes, bonds and mortgages in his possession, and to testify in the matter, and on the 22d of January, 1895, the plaintiff in error, still objecting to the jurisdiction, however, appeared in person and by counsel before the auditor, when by agreement the examination was postponed until the 24th of January, 1895, at which time he appeared again in per-

son and by counsel and filed his written protest against further proceedings by the auditor, which protest was overruled, and he was thereupon examined under oath touching the question of omitted taxes, and was duly notified that if he had any further evidence or could furnish or show any reason why the omitted property should not be listed for taxation, the evidence would be heard, and thereupon the auditor, as required by said Sec. 142, found that there were omitted taxes, the details of such finding being set forth in Finding No. 8, Transcript, pages 19, 20 and 21.

That thereupon the auditor assessed the amount so found due during said several years as omitted property, which had unjustly escaped taxation, and corrected the proper tax duplicates and entered the same upon the duplicate in his office, and also upon the duplicate then in the hands of the treasurer of said county, being the duplicate for the year 1894, and added such omitted property to such duplicate; and on the same day filed in his office, as required by the statute, a statement of the facts in evidence upon which he made such correction. (Transcript, p. 21, Finding No. 8, last paragraph.)

Upon the entering of such omitted taxes upon the tax duplicates in the treasurer's office, the treasurer of the county—the collecting agent for the state, county and municipalities therein—demanded of the plaintiff in error, as the executor, the payment of such omitted taxes, but the plaintiff in error wholly failed and refused to pay such taxes or any part thereof. (Transcript, p. 22, Finding No. 11.)

That thereupon on the 26th day of January, 1895, being the same day upon which the final report of the executor was set for hearing and for final settlement of the estate, the treasurer, as required by Sec. 169 (see appendix), filed his petition in the circuit court of Marion

county, Indiana, in the estate of the decedent, for the payment of the taxes and penalties, and upon this petition so filed the proceedings were had that resulted in the judgment in the circuit court of Marion county for $52,746.69 (Transcript, p. 52); and it is to reverse this judgment that this writ of error is prosecuted upon the grounds stated in the petition for a writ of error (Transcript, p. 55), and in the assignment of errors (Transcript, pp. 53-4).

It will not be claimed in this court that the record discloses that the decedent did not own the property on account of which the omitted taxes were assessed against him by the auditor. It will not be claimed that the evidence upon the trial disclosed or tended to show that he had made true returns of his property for the years from 1881 to 1893, inclusive. Indeed, the statement that he "was engaged in the business of banking and was a stockholder and president of a bank at Indianapolis, and was in the habit of loaning money at interest, investing it in mortgage notes, government and municipal bonds, and that he does not appear to have been engaged in any other business or to have any other investments except for a portion of said time he had some interest, as partner, in a firm buying and selling grain—the nature and extent does not fully appear—from which, it does not appear that he made any gains or losses, and it does not appear that during any of such time for which such taxes were assessed that he owned or held any greater amount of government bonds than said amount held by him at his death and reported by his said executor." (Transcript, p. 23, Finding No. 15.)

When laid alongside of and considered in connection with the fact that when death supervened he was found to have property of that character aggregating in value $383,876.06 in December, 1893, while upon his return,

made between the first of April and the first of June, 1893, he claimed to have and reported only $20,560, makes the conclusion imperative that he had omitted to return his property for taxation, and the amount of the omitted property was, therefore, necessary to be determined by the auditor, and there was no evidence tending to show that the auditor's finding in that respect was erroneous. Nor will it be contended that the plaintiff in error did not have full notice and full opportunity to be heard, nor that he appeared in person and by counsel before the auditor and was heard, nor that he had an opportunity to be heard and was heard in court upon a formal trial in regard to the matters complained of; nor will it be contended that the statutes of Indiana did not provide for notice and an opportunity to be heard. The contention, and the only contention by the plaintiff in error, was and is that the statute of Indiana made provision for and required notice to be given to the residents of the county alone, but that, as the plaintiff in error contends, it did not make provision for notice to those who were not residents of the county, and that as he was not a resident of the county, and the law must be held unconstitutional because it did not provide for notice to him, and, therefore, the notice was of no effect because there was no authority in law to give it, and that, inasmuch as it provided for notice to residents of the county and did not provide for notice to non-residents of the county, he was denied the equal protection of the law, and also the privileges and immunities that were accorded to the citizens of the county of Marion. And in whatever form the plaintiff in error makes his contention or presents the legal proposition in this court, it comes at last to this single question as to the requirement of notice to residents of the county and the alleged failure to

require notice where the party affected is not a resident of the county.

II.

The Legal Questions Presented by the Record.

In the discussion of any legal proposition it is quite essential to ascertain with accuracy and precision the exact question which is in dispute; otherwise we are liable to be misled into the consideration of unimportant questions and permit the decision of the case to be made upon a collateral instead of a direct question in issue.

The plaintiff in error, in his petition for a writ of error (Transcript, p. 55), recites that it was adjudged that the statute of Indiana was valid and that the assessment against the petitioner for omitted taxes under Sec. 8560 (Sec. 142) was binding on him, whereas the act was invalid—

1. As against the provisions of the fourteenth amendment in that

(*a*) it takes the property of petitioner without due process of law;

(*b*) it deprives him of the equal protection of the laws; and

2. As against Sec. 2 of Art. 4 of the U. S. Constitution, because it denies to him equal privileges and immunities.

In his assignment of errors (Transcript, pp. 53-4) he insists

1. That Sec. 8560 is invalid as in violation of Sec. 1 of the fourteenth amendment to the Constitution of the United States, providing

(*a*) that no state shall deprive any person of property without due process of law;

(*b*) that no state shall deny to any person within its

jurisdiction the equal protection of the laws, in that it provides for making an assessment of omitted property without notice to the holder or owner who is a non-resident, while it provides for notice to a resident.

2. That the judgment is invalid because the executor was a non-resident of Indiana, and the assessment under Sec. 8560 was invalid because the statute provides only for notice to residents of the particular county, and, by reason of the assessment, provision is made

(*a*) for the taking of property held and owned by the executor, the plaintiff in error, without due process of law;

(*b*) by a denial to the executor of the equal protection of the laws.

3. That the court held that the executor, for the purpose of assessment, was to be regarded as a resident of Marion county, Indiana, notwithstanding he was a resident and citizen of New Hampshire.

4. That the court held that the executor was not in a condition to question the validity of Sec. 8560 as in violation of Sec. 1 of the fourteenth amendment.

5. That the court held that Secs. 8560, 8587 and 8589 were valid, whereas they were invalid because

(*a*) they permitted the taking of property without due process of law;

(*b*) they denied to him the equal protection of the laws, in that Sec. 8560 provides for notice to a resident tax-payer of Marion county, Indiana, but did not provide for notice to plaintiff in error, a citizen and resident of New Hampshire.

These several objections and propositions, when carefully considered, it will be seen, all grow out of the provisions of the second sentence in Sec. 142 (Sec. 8560): "But before making such correction or addition, if the person claiming to own such property or occupying it, or

in possession thereof, resides in the county, and is not present, he shall give such person notice in writing of his intention to add such property to the tax duplicate, describing it in general terms, and requiring such person to appear before him at his office, at a specified time within five days after giving such notice, and to show cause, if any, why such property should not be added to the tax duplicate. And if the party so notified does not appear, or if he appears and fails to show any good and sufficient cause why such assessment shall not be made, the same shall be made, etc."

By this provision it is made imperative upon the auditor in case the person

(*a*) claiming to own the property, or

(*b*) occupying it, or

(*c*) in possession of it,

resides in the county, and is not present to give notice as a condition precedent to taking action in the matter of omitted taxes, and the section is silent on the subject of imposing the duty upon the auditor of giving notice otherwise. The silence on this subject is not simply applicable to the case of a man resident in New Hampshire, or any state other than the state of Indiana, but applies equally to the residents of each and every of the other ninety-one counties within the state of Indiana. In that respect a non-resident of the county is put upon exactly the same footing and basis of a non-resident of the state or of the country.

It is proper to note in this connection that the distinction is not at all between citizens. Citizenship has nothing whatever to do with the question of notice or lack of notice. It all depends upon the question of the residence of the particular person to whom the notice is to be given, and in that connection no distinction whatever is made between the owner, the holder or the occupant.

The statute does not impose upon the officer the duty of inquiring with care, or at all, as to who is the actual owner. If he finds some one in possession, that is entirely sufficient for the purpose of taxation and for giving notice, and the question may then be resolved and simplified into three propositions:

1. Is the act in question invalid as in violation of Sec. 1 of the fourteenth amendment, or of Sec. 2 of Art. 4 of the Constitution, because it fails to make provision for notice to a non-resident of the county, while it actually makes provision for notice to the owner, holder or occupant who resides in the county and is not present?

2. Whether it was within the power of the state of Indiana, by its legislation, to provide that for the purpose of taxation as to property having a local situs, being administered in one of its courts, the person in charge, *quoad* that property, should be deemed and held to be, for the purpose of taxation and the necessary notices connected with it, a resident of the county which was the situs of the property to be assessed.

3. Whether, if it were in the power of the state to make such provision by its legislation, it has so provided.

For the defendant in error I beg to submit and insist that the latter two of these propositions should be answered in the affirmative, and being so answered, the case before the court is disposed of wholly without reference to what the answer should be to the first proposition. The first proposition, when the second and third are answered in the affirmative, constituting simply a moot court question which the supreme court of Indiana had no right to answer, and which this court ought not to decide, for the reason that the plaintiff in error has no right to be heard, nor will this court consider whether in some other case, as applied to some other parties under other and different facts, the provision in question is

obnoxious to the provisions of the Constitution of the United States.

III.

The Rule of Law Governing the Consideration and Determination of Constitutional Questions.

By the constitution of Indiana (Art. 15, Sec. 4) it is provided that,

"4. Every person elected or appointed to any office under this constitution shall, before entering upon the duties thereof, take an oath or affirmation to support the constitution of this state and of the United States, and also an oath of office."

By Sec. 7533 of the Revised Statutes of Indiana (Burns' Ann. Rev. of '94, Vol. III, p. 524), it is provided that

"Every officer and every deputy, before entering on his official duties, shall take an oath to support the Constitution of the United States and of this state, and that he will faithfully discharge the duties of such office."

Under this provision of constitution and statute, every member of the General Assembly that enacted the law of 1891, including the speaker of the house and the president of the senate, who authenticated it, was under obligation to support primarily the Constitution of the United States, because it was, under Art. VI of the U. S. Constitution, "the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution and laws of any state to the contrary notwithstanding." Not only was the legislature under such obligation, but the governor, who approved the bill, the

auditor, who enforced the proceedings complained of, and the judge of the circuit court and the supreme judges of the state, who decided this case, were, under the obligations of their oaths, bound by the requirements of the Constitution of the United States.

It is doubtless true that legislatures, governors and state judges have been and may be mistaken in their views of what the Constitution of the United States requires, but the presumption is in favor of their action, and courts, in construing laws and deciding cases that come before them, are under obligation to presume that their acts are in harmony with the requirements of the constitution that they are sworn to obey. And that presumption is not limited to the courts of the state, but reaches even to this high court. I find no better statement of the duty devolving upon the courts in the decisions of Indiana than that stated in *Robinson, Treasurer*, v. *Schenck*, 102 Ind. 307, at p. 319, viz.:

"The power to declare a statute void on the ground that it is in conflict with the constitution, is peculiar to the American courts, and the doctrine established by our cases is not found in other systems of jurisprudence. The early cases upon this subject show that the courts at first asserted this doctrine with much hesitation, and there are still some writers who deny the existence of the power, but it is now firmly fixed in our law. (Citing authorities.) The power is one of the highest possessed by any judicial tribunal in the world, and is, as all the authorities agree, to be exercised with the utmost care and only in the clearest cases. If there is doubt in the mind of the court as to the validity of the statute, it must be resolved in favor of the legislature. It devolves upon the party who assails a statute on the ground that it violates the constitution to show a clear violation and to point out the provision violated; failing in this, his attack is unavailing. The courts are reluctant to declare statutes unconstitutional because of the high power they as-

sert in doing so, and because of the respect which is due to the judgment of one of the co-ordinate departments of government. In exercising this power the courts necessarily overthrow the judgment of the legislature that enacted the statute and of the chief executive who approved it, and it is just that they should assert the power only in very clear cases. This consideration leads to the conclusion that courts should overrule their own decisions rather than assume a power which places them above the executive and legislative departments of the government, in cases where investigation has convinced them that their former decisions were erroneous. Much less evil will result from a departure from former decisions than from an assumption of so great a power as that of declaring statutes unconstitutional."

In the Sinking Fund Cases, 99 U. S. 700, this court, speaking by Chief Justice Waite, said at p. 718;

"The single question presented by the case of the Union Pacific Railroad Company is as to the constitutionality of that part of the act of May 7, 1878, which establishes in the treasury of the United States a sinking fund. The validity of the rest of the act is not necessarily involved.

It is our duty, when required in the regular course of judicial proceedings, to declare an act of congress void if not within the legislative power of the United States; but this declaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government can not encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

In *Martin* v. *The State*, 143 Ind. 545, the effort was made by the appellant and the state to have determined the question of the validity of the coal-screening law,

and, with reference to that effort, the court said at p. 547:

"Counsel for appellant inform us in their brief that 'It is the purpose of appellant to attack the constitutionality of the act under which he was prosecuted. Indeed, such is the sole purpose of this appeal, and it is not the desire of the appellant to present or have passed upon any other question.'"

After considering the record and finding another question upon which the case might be disposed of without considering the constitutional question presented, the court said at p. 549:

"It is settled law in this court that the constitutionality of a statute will not be determined by this court when the cause in which its determination is sought may be decided and finally disposed of without such decision."

And the case was decided without any further reference whatever to the constitutional question.

In the case of *Marbury* v. *Madison, Secretary of State, etc.*, 1st Cranch 137, the jurisdiction of this court depended upon the validity of the act of congress purporting to give to it the power to issue a writ of mandamus in the exercise of original jurisdiction. If congress had the power to pass the act under consideration, the supreme court had jurisdiction to pass upon the question presented by the record. If congress had not the power to pass the act, the supreme court had no jurisdiction. Jurisdiction is the right to "speak the law," and where a court has no jurisdiction, ordinarily, if not universally, its power only extends to saying that it has no jurisdiction, and it may not "speak the law" upon other matters.

Two methods were open to the court. One was in the first instance to inquire into the validity of the act in

question, wholly without reference to the other legal propositions in the case, and confine its consideration solely to the question of the constitutionality of the law. The other was to inquire whether there was such a state of facts presented by the record as imperatively required the court to consider the question of the constitutionality of the law by reason of which it had no jurisdiction in the case.

If there were no limitation or restriction upon the power of courts to consider and determine the question of the constitutionality of the law, the plain duty was to first take up and dispose of the jurisdictional question, and, having ascertained that it had no jurisdiction because of the unconstitutionality of the law, to express no opinion whatever upon the merits of the case as presented by the record. This court, in deciding that case, did not give its reasons for taking up first the merits of the case, but did, before coming to the constitutional question, consider the merits showing that there was an imperative obligation upon the court that it could not avoid of considering the constitutional question. From that day to this the criticism has been made against the great chief justice that he permitted his animosity against the then President of the United States to control his own judgment and that of this high court by going outside of and beyond the record and considering the merits where it had no jurisdiction to consider any question except that of jurisdiction. I submit that that case is authority for the proposition, if authority be needed, that even this court ought not to be heard to determine the constitutionality of a solemn act of congress or of the legislature of a state where the condition of the record is such that it can be disposed of upon some other proposition, and that when it so acts it can not be justly said that its de-

termination on the antecedent proposition is merely an *obiter dictum.*

IV.

WHAT IS THE MEANING AND REQUIREMENT OF DUE PROCESS OF LAW WITHIN THE LANGUAGE OF THE FOURTEENTH AMENDMENT, FORBIDDING TO THE STATE THE POWER TO DEPRIVE ANY PERSON OF * * * PROPERTY "WITHOUT DUE PROCESS OF LAW?"

Text writers and judges having occasion to make application of the expression, "due process of law," call attention to the difficulty of giving a precise and accurate definition of it that shall at the same time be sufficiently comprehensive to cover all cases. In general terms it is synonymous with "the law of the land."

Cooley's Constitutional Limitations, Chapter 11, p. 430.

Hare's American Constitutional Law, Vol 2, p. 836.

Dent v. *West Virginia,* 129 U. S. 114.

Murray's Lessees et al. v. *Hoboken, etc., Co.,* 18 How. 272.

In the Great Charter the latter expression is used, while in the fifth and fourteenth amendments to the U. S. Constitution the former; and the language in the Bill of Rights in the constitution of Indiana, Art. I, Sec. 12, is "due course of law."

Anderson, in his dictionary of law, defines it as:

"A course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights."

Speaking generally, it is the shield that is thrown around the citizen by the constitutions, state and national, to protect him in his natural rights of life, liberty and property. Speaking more definitely and precisely, it is those provisions of statute or common law within and limited by the constitutions, national and state, by or through which the citizen may be legally deprived of any one or more of these three cardinal rights inherent in every citizen, and they vary with reference to the particular process brought to bear upon it.

(*a*) As to life and liberty.

Ordinarily the citizen may not be deprived of his life or liberty, except upon an indictment by a grand jury, or, in special cases, by information and a trial before a jury of his peers. Extraordinarily he can, by voluntary enlistment or impressment in time of war, as a soldier, and misconduct as such, when he may be tried by courts-martial and imprisoned or executed under military law.

Martin v. *Mott,* 12 Wheaton 19.

But to constitute "due process of law" in such case the person must be subject to military law.

Ex parte Milligan, 4 Wallace 2.

This may also come in other special methods, as with Judge Terry in his assault upon Justice Field.

In re Neagle, 135 U. S. 1.

(*b*) So, as to property these deprivations may be two-fold, namely, the ordinary and the extraordinary.

The ordinary deprivation is by judicial proceedings where the party must have his day in court, be served with process, or, in special instances, where the court can not acquire jurisdiction over the person, but does over the *res.* The notice may be given by publication in the man-

ner fixed by the legislature or the court, by authority of the legislature, in such manner as is reasonably calculated to afford him notice and the opportunity to defend. In such case "due process of law" is an investigation by judicial machinery; a judicial investigation under the form and with the machinery provided by the wisdom of successive ages for the investigation, judicially, of the truth of the matter in controversy.

Chicago, Milwaukee & St. Paul Ry. Co. v. *Minn.*, 134 U. S. 457.

Pennoyer v. *Neff*, 95 U. S. 733.

The extraordinary are of various kinds:

1. In time of war the right of the government to destroy property standing in the way of actual military operations is conceded by all writers. No leave was ever asked of the property-holder or granted by him to occupy the peach orchard or the wheat field at Gettysburg, although such owner may have been resting in the peace of the state of Pennsylvania and of the United States.

2. In times of great public calamity, such as a general conflagration or a plague, the right to destroy buildings or other property necessary to stop the spread of the destroying element, or to interfere with personal liberty, is unquestioned.

3. Which should perhaps be denominated as "summary" rather than extraordinary, and stands rather between, for the purpose of taxation, in order to afford to governments the means of existence, the machinery provided by law for the assessment, levy and collection of taxes is a sufficient warrant to deprive the citizen of his particular property; to collect from him by distraint and sale of his property, where he fails or refuses to pay the taxes assessed against him, and as to this, the notice, assessment and levy of taxes and delivery of duplicate to

the collecting officer and a regular demand and sale, after the notice prescribed by law, fulfill all the requirements of "due process of law" or "the law of the land."

French v. *Barber, etc., Co.,* 181 U. S. 324.
Kelly v. *Pittsburgh,* 104 U. S. —.
Springer v. *U. S.,* 102 U. S. 586.
Kelly v. *Sanders,* 99 U. S. 441.
De Treville v. *Smalls,* 98 U. S. 517.
Davidson v. *New Orleans,* 96 U. S. 97.
McMillan v. *Anderson,* 95 U. S. 37.
Murray's Lessees et al. v. *Hoboken, etc., Co.,* 18 How. 272.

The "law of the land," however, does not necessarily mean simply a statute enacted for the particular occasion or purpose, for it might be that such a statute would not be in harmony with the constitutions, national or state, one or both, in which case it would not be "law of the land;" it would be no law. An enactment of the congress, general assembly, or any inferior body, in violation of the constitution, is simply a nullity, but where there has been passed and enforced a valid law of taxation, under and in compliance with which the citizen has been deprived of his property, such deprivation can not be said to be "without due process of law." For enforcement of the laws requiring the raising of revenues for the support of the government, the intervention of the courts, the lingering processes of the "law's delay," are not essential. Notice is to be given without doubt, but what that notice shall be and how it shall be given are questions for the law-making power to determine, and its decision will be final and conclusive, except, perhaps, in the instance where the court would be compelled to hold that the notice provided for was in fact or in law

no notice, and the party in interest could not thereby be apprised of anything. Such notices vary with reference to the objects to be attained. Where boards of equalization are simply to equalize between localities, the provision of the law requiring them to meet at a particular time and place is sufficient notice to all parties in interest, although in equalizing they not infrequently seriously add to the burdens of individuals who are not expecting it. When the individual as such is to be affected, the notice provided is usually a personal one, although that is held not to be essential. Where special organizations are to have their assessments fixed by the body to whom that matter is committed, notice of the meeting of that body is ordinarily sufficient, and the party is bound, at his peril, to attend.

It is somewhat instructive, but not at all flattering, to note the progress of the law in the state of Indiana in regard to the assessment of property for taxation. "In our grandfathers' days" it seems to have been taken for granted that all persons, including corporations, would honestly return all their property for taxation at its fair value, and, until the passage of the act of 1872, there seems to have been no substantial provision by which the authorities might question the correctness of the tax return, but since then, and in these degenerate days, the main endeavor of all systems of taxation has been to make provision by law to compel a fair and equal assessment and to clothe the authorities with ample power to discover, ascertain and assess hidden, concealed and omitted property and values. With reference to natural persons, this is accomplished by conferring upon county and township assessors, auditors, treasurers and boards of review large powers of investigation, and with reference to artificial persons, by requiring some public board to make the assessment in the first instance, requiring the

party to be assessed to furnish the board assessing necessary information and giving to the party notice of the time and place of the meeting at which the assessment is to be made.

The constitution of Indiana, Art. X, Sec. 1 (Burns' Ann. Rev. of 1894, Vol. I, p. 53), requires that:

"1. The general assembly shall provide, by law, for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, etc."

So that the tax system of Indiana is and is required to be almost exclusively the *ad valorem* system, and the main duty imposed upon assessing officers and boards is to ascertain the value of the property that is subject to taxation. As applied to personal property in the hands of individuals, trustees, executors, administrators, guardians, etc., it is provided that the assessment shall be made in the first instance by local assessors, with powers of review for either increase or decrease in the county board of review, and for further review by appeal to the state board of tax commissioners.

By Sec. 48, between the first of April and the first of June, the township assessor is required to personally call upon and furnish each person with an assessment blank upon which such person is required to make to such assessor a full and correct description of all his personal property, together with his estimate of its value; the assessor is thereupon required to determine and settle the value of each item, after examining the statement and also after an examination, under oath, of the person or any other person, in case he shall deem it necessary. For the purpose of this assessment the township assessor is not required to give the party assessed any notice whatever,

except the delivery of the blank list. And his subsequent action is simply proceeding in due course of law to ascertain the value.

By Sec. 56, in case the person to whom the blank list has been delivered refuses to fill out the statement or to subscribe to any oath, the township assessor must ascertain, in the best manner possible, the property owned by the person so refusing, and to this valuation, when so made, the county auditor shall add fifty per cent., which shall stand as the valuation for taxes. Under this section no notice is required to be given to the person being assessed, except as above.

Under Sec. 105, the township assessor, on or before June 1, is required to make out and deliver to the auditor a list of the persons assessed by him.

By Sec. 106, the county auditor may require the township assessor to correct errors or omissions in the list returned.

By Sec. 108, whenever the township assessor, before filing his return with the county auditor, has reason to believe that property has been omitted, he must, if the person resides in the township, give him notice and then assess the omitted property.

By Sec. 113, the county auditor is required to deliver to the county assessor the assessment returns, which he shall examine, and, with reference to omitted property, has the same power that is given to the township assessor, and must return the lists on or before the first Monday after the 4th of July in each year to the county auditor.

This ends the due process of law as to the lists of personal property which is begun by the original delivery of the blank lists to the individual, and thereafter, if change or addition be made by board of review or officer, it must be upon notice, as provided in the various sections of the act.

By Sec. 114 the county board of review takes charge of the lists, but can make no additions or changes without the notice to the person in interest prescribed in the section.

By Sec. 115 the county board of review may equalize, as between townships, the result of which may greatly increase particular assessments in particular townships, but of such increase or intention to increase the statute requires no notice except the general notice of the meeting of the county board of review.

In the case at bar no question is presented of any alleged violation of the Constitution of the United States in the ordinary administration and assessment of property of the decedent while he was making returns. The questions presented arise wholly under the act of the officers with respect to omitted taxes, but I have thought it not out of place to call the court's attention to the general provisions of the law showing the care that is required to be exercised by the assessing officers to reach every possible value that is subject to taxation, and in aid of this I have attached to the brief, as an appendix, a statement of the tax law of 1891, as amended in 1893 as to several of its sections, that was in force at the time the acts complained of took place, and I have included in the appendix every section that, as it seems to me, may by any possibility throw any light upon the duties of assessing officers with respect to the assessment of personal property in the hands of individuals, whether in their own right or as agents, occupants, trustees, guardians, executors, or administrators, and this not for the purpose of extending the labors of the court, but for the purpose of having the provisions of the law easily accessible, so that they may not be required to go to the bulky statutes covering the acts, but the references show where the

particular sections are to be found in the Revised Statutes.

V.

The Denial of "Due Process of Law" or the "Equal Protection of the Laws," and of the Privileges and Immunities of Citizens of the United States as Claimed by Plaintiff in Error.

The only objection that is presented or insisted upon under either of these subdivisions is the absence of notice, and it is not claimed that there was actually any absence of notice, but the contention is that there was no provision of law requiring notice to be given in this particular case, while the statute in terms requires notice to be given to the residents of the county, and, therefore, that the notice that was in fact given was in law no notice, and consequently the proceedings resulted in the deprivation of property without due process of law, the denial of equal protection of the laws and the denial of privileges and immunities of citizens, etc.

As to the Necessity for Notice.

The leading case on that subject in the state of Indiana is that of *Kuntz* v. *Sumption*, 117 Ind. 1, where the supreme court of Indiana holds that no notice whatever having been provided for in the statute, the change made by the county board was inoperative, the law in that respect being unconstitutional, because it authorized the deprivation of property without a notice, and therefore without due process of law. And, speaking of that case, and with the avowed purpose of limiting its decision to

the particular point decided, the court, at page 3, uses the following language:

"We do not assert that the proceedings would be void where there is some notice, although not given in strict conformity to law, for we know that a defective notice, assumed to be given under a statute, will be sufficient to uphold jurisdiction as against a collateral attack. * * * We approve as fully as language can do the doctrine of former decisions that the legislature has ample authority to prescribe what the notice shall be. * * * We affirm, too, that whether the notice is by publication or by personal service, it will sustain jurisdiction, provided there is back of it some law providing for notice."

And at page 2:

"We limit our decision to this point, and mark the limit as distinctly and definitely as we can."

In *Stuart* v. *Palmer*, 74 N. Y. 188, the court said:

"The legislature may prescribe the kind of notice and the mode in which it shall be given, but it can not dispense with all notice."

The Sec. 142 questioned by the record does not fail to require notice. It says carefully and specifically that the auditor, having discovered and received credible information, or having reason to believe that property has been omitted, should proceed to correct the tax duplicate and add the omitted property, with the proper valuation, and charge the property and the owner thereof with the proper amount of taxes; but

"If the person claiming to own such property, or occupying it, or in possession thereof, resides in the county and is not present, he shall give such person notice in writing of his intention to add such property, * * * and requiring such person to appear before him at his

office at a specified time, within five days after giving such notice, and to show cause, if any, why such property should not be added to the tax duplicate; and if the party so notified does not appear, or if he appears and fails to show any good and sufficient cause why such assessment shall not be made, the same shall be made," etc.

It will be observed that the notice required is

(*a*) to the owner;

(*b*) to the person occupying it;

(*c*) or the person in possession thereof;

and the test of the requirement to give or not to give notice is not at all the citizenship of the party, or even his ownership. He must be in some manner in charge of it either as owner, occupant, or in possession, and he must be, as such owner or occupant, or person in possession, a resident within the county. No attempt whatever is made to distinguish between citizens of Indiana or of other states. Nothing is dependent, so far as the notice that is to be given is concerned, upon the rights or the obligations or the privileges or immunities of the citizens as such. It is all a question of the person connected with the situs of the property that is to be assessed. And it becomes, therefore, important to determine what is the proper meaning of the word "resident," as used in this statute.

To reside, according to the Century Dictionary, is:

"To dwell permanently or for a considerable time; have a settled abode for a time, or a dwelling or home; specifically to be in official residence. (Said of holders of benefices, etc.)"

And, according to Abbott's Law Dictionary, it is:

"To live at or in a place; to dwell; * * * A railroad corporation, in legal contemplation, resides in the

counties through which its road passes and in which it transacts its business, so that it may be sued or taxed in any county through which the road passes or in which its corporate powers are exercised."

According to Webster, it is

"To dwell permanently or for a considerable time; to have a settled abode for a time; to abide continuously; to have one's domicile or home; to remain for a long time."

And, according to the Standard Dictionary:

"(1) To make an abode for a considerable time; be settled as in a home; live; dwell; (2) to be in official residence; be present in a benefice the statutory time."

In Winfield's Adjudged Words and Phrases, pages 535-6, speaking of the residence of a corporation, it is said:

"A joint stock company resides where its place of incorporation is, where the meetings of the whole company or those who represent it are held, and where its governing body meets in bodily presence for the purposes of the company and exercises the powers conferred upon it by statute and by the articles of association."

According to Black's Law Dictionary, residence is

"The place where a man makes his home, or where he dwells permanently, or for an extended period of time."

According to Bouvier, Rapalje's Revision, Vol. II, pages 904-5, residence is

"Personal presence in a fixed and permanent abode; the abode where one actually lives; not the legal domicile." (Citing authorities.)

"A residence is different from a domicile, although it is a matter of great importance in determining the place of domicile. The essential distinction between residence and

domicile is that the first involves the intent to leave when the purpose for which he has taken up his abode ceases. The other has no such intent. The abiding is with *animo manendi*. One may seek a place for the purposes of pleasure, of business or of health. If his purpose is to remain it becomes his domicile; if his intent be to leave as soon as his purpose is accomplished, it is his residence. (Citing authorities.) But it has been held synonymous with domicile. (Citing authorities.) Residence indicates permanency of occupation as distinct from lodging or boarding or temporary occupation, but does not include as much as domicile, which requires an intention combined with residence. (Citing authorities.) * * * An averment of residence is not equivalent to an allegation of citizenship." (Citing authorities.)

A resident, according to the same authority:

"One is a resident of a place from which his departure is indefinite as to time, definite as to purpose, and for this purpose he has made the place his temporary home."

In *Wallace* v. *The State*, 147 Ind., the supreme court, construing the statute against kidnapping, which makes it a crime to carry off, etc., one "from his place of residence," says, at page 624:

"The evident purpose was rather to provide against the kidnapping of a person from any place where he has a right to be, whether that be the place of his temporary sojourn or permanent domicile."

The constitution of Indiana (Art. VI, Sec. 5) provides that "the governor, the secretary, auditor and treasurer of state shall severally reside * * * at the seat of government."

The seat of government in Indiana is Indianapolis. Similar provisions are made by statute with reference to other state officials. These provisions cover their offi-

cial residence, but in no manner affect their domicile. During the term for which they are elected their official residence is at Indianapolis. Their personal residence, their domicile, may nevertheless continue in their homes, from which they came to fill official position, and to which they intend to return after their official existence is terminated. Residence is to a large extent a matter of intention, but not altogether. Strictly speaking, it is perhaps applicable only to natural persons and with respect to which they may have a personal intention, but it is by no means limited to natural persons nor to the intention which a natural person may alone have. In the case of corporations, fiduciaries, public officials or *quasi*-public officials, the intention may be indicated by the statute creating or governing the particular person whose residence is to be provided for.

Strictly speaking, a corporation could not be well said to have an intention as to its residence. If there be any intention connected with it, it is the intention of the legislature which brings it into existence, and yet this court, speaking by its Chief Justice, in *Railroad Co.* v. *Koontz*, 104 U. S. 5, said, at page 12:

"We can hardly believe if an individual, a citizen of a state other than Virginia, went into that state and leased the property of a Virginia corporation, to use as the corporation did, it would be claimed that he made himself thereby a citizen of Virginia, within the meaning of the constitution and laws of the United States. Citizenship in this connection has a special signification. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. Amend. 14, Sec. 1. A corporation may for the purposes of suit be said to be born where by law it is created and organized, and to reside where, by or under the authority of its charter, its principal office is. A corporation, therefore, created by

and organized under the laws of a particular state, and having its principal office there, is, under the constitution and laws, for the purpose of suing and being sued, a citizen of that state, possessing all the rights and having all the powers its charter confers. It can not migrate nor change its residence without the consent, express or implied, of its state."

For the purpose of taxation, the residence or the situs of the property, or its agent in charge, is and must necessarily be fixed by the legislature which makes provision for its assessment for taxation and its taxation.

By Sec. 11 of the law of 1891 it is provided that:

"All personal property shall be assessed to the owner in the township, town or city of which he is an inhabitant on the first day of April, * * * with the following exceptions:

"*First.* All goods and chattels situated in some township, town or city other than where the owner resides, shall be assessed in the township, town or city where situated," etc.

"*Second.* All animals kept throughout the year in some township, town or city other than where the owner resides, shall be assessed to such owner, or the person in possession in the township, town or city where kept.

"*Third.* All shares in banks shall be assessed to their owners in the city or town where the bank is located.

"*Fourth.* Personal property of non-residents of the state shall be assessed to the owner or to the person having the control thereof in the township, town or city where the same may be," etc.

"*Fifth.* The personal property of minors under guardian shall be assessed to the guardian in the township, town or city where the guardian resides * * * *, and the personal property of every other person under guardianship shall be assessed to the guardian in the township, town or city where the ward resides.

"*Sixth. The personal property of the estates of deceased persons in the hands of executors, administrators*

*or other persons shall be assessed to the persons in charge of such property in the township, town or city where the deceased last dwelt, * * * If such decedent was a non-resident of the state, such property shall be assessed in the township, town or city where situated.*

"*Seventh.* Personal property under the control of a trustee or agent, whether a corporation or natural person, may be assessed to such trustee or agent, except as otherwise by law provided, in the township, town or city in which such trustee or agent resides."

Sec. 12 provides that in the assessment of corporate property, including capital stock and franchises,

"The place where its principal office in this state is situated shall be deemed its residence, but if there be no principal office in the state, then such property shall be listed and taxed at any place in the state where the corporation transacts business."

Sec. 13 provides that:

"For the purpose of assessing property and collecting taxes, a co-partnership shall be treated as an individual, and * * * shall be deemed to reside in the township, town or city where its business is principally carried on. Each partner shall be liable for the whole tax."

And this wholly without reference to the fact that every partner may reside in an entirely different county from the county in which the business is carried on, or even may reside beyond the limits of the state.

By Sec. 14:

"Personal property *in transitu* shall be listed * * * where the owner resides: *Provided*, That if such property is intended for a particular business, it shall be listed and assessed at the place where the property of such business is required to be listed and assessed."

By Sec. 15, in the case of steamboats, etc., they are required to be listed where they belong, or are enrolled or kept.

By Sec. 16, banks, etc., are required to be listed where the personal property is situated.

By Sec. 17, the property of gas, etc., companies is required to be listed in the place where the principal works are located.

By Sec. 18, property of street railroad, etc., companies is required to be listed and assessed where the principal place of business is located, while the track, etc., is required to be listed and assessed where it is located.

By Sec. 33, property in the possession of any person as a pledge or security is to be listed by and taxed to the person in whose possession it is.

From April, 1862, to December, 1893, the decedent resided in Indianapolis, and the requirement was on him, therefore, that all of his personal property should be listed and assessed in that city, in Marion county, and when he died in Marion county the personal property that he left had a situs in Marion county, and for all purposes of taxation the property, credits, effects and liabilities, whether inchoate or absolute, that had appertained to him, were, by force of law, made resident, for the purposes of administering the estate and for the purposes of taxation, in Marion county, wholly without reference to the personal domicile or citizenship of the executor or administrator, who might under the law be charged with the duty of administering the estate.

It is not at all instructive to inquire what rule would obtain with respect to the exercise of jurisdiction in litigated cases in the United States courts. By the constitution of the United States, jurisdiction, where it depends on diverse citizenship, is not made to depend at all upon

the residence of the parties, but depends absolutely and solely upon their citizenship.

In *Grand Trunk Ry. Co.* v. *Twitchell, Admr.*, 59 Fed. 727, it is held by the Circuit Court of Appeals for the First Circuit that an averment of residence is not equivalent to an averment of citizenship. Indeed, the proposition is so elementary that it does not need nor justify the citation of authorities.

By Sec. 2365 (Burns' Ann. Rev. of 1894, Vol. I, p. 769) it is provided that

"The circuit courts of this state shall have exclusive original jurisdiction of all matters relating to the probate and contest of last wills and testaments, the granting of letters testamentary and of administration, and the settlement and distribution of decedents' estates. The court granting the letters shall have exclusive jurisdiction of all matters touching the settlement and distribution of the estate whereon said letters shall have been granted."

See also *Hiatt* v. *Hiatt*, 30 Ind. 190.
Heaton v. *Knowlton*, 65 Ind. 255.
Williams v. *Perritt*, 73 Ind. 57.
Hillgenberg v. *Bennett*, 88 Ind. 540.

By Sec. 2381, *Ib.*, p. 773, it is provided that "Such letters (testamentary and of administration) shall be granted in the county—First, Where at his death the intestate was an inhabitant," etc.

By the terms of these sections, all matters appertaining to the settlement and distribution of the estate and its administration were necessarily committed to the Circuit Court of Marion county, the county in which the decedent died, leaving assets and liabilities, and all matters pertaining thereto were necessarily within the exclusive jurisdiction of the Marion Circuit Court.

These sections of the statute have been in force since

the 19th of September, 1881, and have been substantially the same since 1852, immediately following the adoption of the constitution in 1851, except that from that time until 1873 the common pleas courts of the county had jurisdiction of probate matters instead of the circuit courts, until they were abolished by the acts of 1873 and all business transferred to the circuit courts. And it was with reference to these existing provisions of the law and Specification Sixth of Sec. 11 of the act of 1891, *supra*, that Secs. 142, 169 and 171 of the act of 1891 were enacted.

These several sections, viz., 2365, 2381, Specification Sixth of Sec. 8421 (being Sec. 11 of the act of 1891), Secs. 8560 (142), 8587 (169), 8589 (171), were all *impari materia*, to wit: the management, control, jurisdiction, taxation of the property of a decedent where the estate is pending in a county in the state, and should therefore be construed together, and, so construed, it is quite clear that it was the intention of the General Assembly of this state to clearly establish the proposition that the property of such a decedent's estate and all rights connected therewith, should have a situs in the county and in the court where the estate was being administered and settled, and that its agent in charge, the executor or administrator, should, within the letter and intention of Sec. 142 (8560), be deemed to be a resident. It is much more easy, I submit, and does much less violence to the language, to say that an administrator or executor is, *quoad* the trust funds and property in his charge, a resident of the county in which the court is situated by which he is appointed and under whose orders he is administering his trust than it is to say, as did this court in *Railroad Co.* v. *Koontz*, *supra*, that "a corporation may, for the purposes of suit, be said to be born where by law

it is created and organized, and to reside where by or under the authority of its charter its principal office is."

It was for the courts of this state to construe the meaning of these various sections, and when its jurisdiction was challenged and it was required to construe the section, and in so doing held that the administrator, for the purposes of administering the estate, and for the purposes of taxation, *quoad* the property in his hands, was a resident of the state. it is exactly as though the General Assembly had added to Specification Sixth of Sec. 11, *supra,* the words: "and for all purposes of taxation, notice and orders with respect to said taxes, the administrator of said estate shall be deemed and held to be a resident of the county wherein said decedent died, and wherein said real estate is situated."

Doubtless the statute could not have said, nor could the supreme court have said, that said executor or administrator in charge of said estate should be deemed and held to be a citizen of Indiana, so as to deprive in any proper case the United States courts of jurisdiction. The jurisdiction of the United States courts is conferred by the act of congress under and in accordance with the provision of the Constitution of the United States authorizing the creation of United States courts and the definition of their jurisdiction, and that law and that constitution is senior and paramount to the law or the constitution of Indiana under which the courts were created, but, as suggested *ante,* there is a broad distinction between residence and citizenship. And the courts of Indiana were in the proper exercise of the jurisdiction conferred upon them when, in construing the statute, they held that, for the purposes of taxation as to the property being administered in the courts of Marion county, the agents in charge, to wit, the executor, must be held to be a resident of that county and of that court.

It is entirely foreign to the discussion to say, as the learned counsel for plaintiff in error says at pages 48 and 49 of his brief, that under Secs. 2401 and 2402, where the executor or administrator stands at arm's length to his estate, provision is made for notice of an application for his removal. It would be entirely competent for a court administering an estate, whether the administrator or executor was a resident of the county or not, to cite to him to show cause why he should not be removed, notwithstanding there were such sections of the statute as 2401 and 2402, and no specific provision for giving notice. In such case the court would have the power to direct what form of notice should be given. He was an officer of the court, and, in contemplation of law, always present in court. For the purpose of administering the estate, he was the hand of the court, as the receiver is the hand of the court for the purpose of administering the particular estate that the court has taken charge of. I know of no provision of the law, either in the statutes of the United States or of the statutes of Indiana, and I think there is none, that prescribes what form of notice shall be given to a receiver where proceedings are pending to remove him for cause. Doubtless notice must be given, but the form of the notice is invariably such as the court may prescribe as sufficient, and does not depend upon any statutory enactment.

VI.

The Specific Objections to the Act in Question Presented and Discussed in the Brief of Plaintiff in Error.

I beg to submit that the foregoing suggestions dispose of all the questions presented by the record. Life is too short and the name of this paper will preclude a discus-

sion *seriatim* of everything touched upon in the brief of plaintiff in error and the various authorities cited in support thereof. Without unduly extending the length of this brief, however, it seems to me that some suggestions thereon ought to be made.

At page 14, under the head of "Argument," the learned counsel says:

"The opinion of the supreme court seems to concede that the statute in question, Sec. 8560, is invalid as to non-residents of the state of Indiana, but refuses to recognize such invalidity, because, first, it is said that the plaintiff in error, although not a resident of Indiana, and although in fact a resident and citizen of New Hampshire, is yet to be treated as an "official" resident of the state of Indiana and of Marion county, and of the Marion Circuit Court (p. 39) (whatever a resident of a court may be); and, second, because, although the statute may be invalid, yet it is said that plaintiff in error is not in a condition to insist upon such invalidity because of such alleged official residence."

This is very far from being a correct statement of what the supreme court of Indiana did. As we have seen *ante*, in *Martin* v. *The State*, *supra*, the supreme court of Indiana is not at liberty to pass upon the alleged constitutionality of a statute where the case can be disposed of otherwise. This does not simply mean that the supreme court did not feel at liberty to hold an act unconstitutional; it means that the supreme court will not consider the constitutionality of an act at all unless by the condition of the record it is coerced to do so. It would be an extraordinary proposition to say that a court should enter upon the consideration of the constitutionality of an act, and, having been forced to the conclusion that it was invalid, it would not decide the question, but if it should arrive at the conclusion that it was valid, it would so hold,

and that is not the rule in Indiana, but the rule is specific, as stated in *Martin* v. *The State*, that where a case may be disposed of upon other questions, they will not decide the constitutional question, and so with reference to the proposition that the plaintiff in error was not in a condition to insist upon the validity of the statute because, as applied to him, it was valid. If the rule were otherwise the books might be full of cases where a party, for ulterior purposes or motives, might go into court with the proposition that a certain enactment was unconstitutional, and if the duty devolved upon the court whenever such a contention was made, we would have the extraordinary situation of courts passing upon the solemn act of co-ordinate departments of the government where there was no right in the party before the court to question, and where, under such circumstances, the question was simply and solely a moot court question, and consequently no person having a proper interest in presenting the question, it might well be supposed that the question would not fairly be presented to the court. Courts are organized for the purpose of hearing questions of law upon which property or personal rights depend, and when they go beyond that, there is no decision; their language is simply an *obiter dictum*, and the result would be to bring the courts into disrepute and render their judgments a reproach to jurisprudence.

But with reference to the constitutional question itself —and I still insist that the record does not challenge the decision of the constitutional question—I beg to submit that the language of Sec. 142 (Sec. 8560) is so broad and general that it is difficult to conceive of a case in which notice is not provided for. The language is:

"If the person

(*a*) claiming to own such property, or

(*b*) occupying it, or
(*c*) in possession thereof," etc.

Personal property, as such, necessarily has a situs. It must be in the possession of some one. Whether tangible personal property, note, or other chose in action, some one must in law have the possession. Even if it should be deposited in bank, the possession is with the bank, and the requirement is made so broad that, I submit, there can be no conceivable case where, under the language "claiming to own, occupying or in possession thereof" will not reach every species of personal property within the state subject to taxation. Therefore, the act is constitutional because it necessarily provides for notice in every instance.

Great stress is laid upon the cases of *Kuntz* v. *Sumption*, 117 Ind. 1, and *Eaton, Treasurer*, v. *The Union County National Bank*, 141 Ind. 159, and they are treated in appellant's brief, and to a certain indefinite extent in the opinions, as though they were cases where notice had actually been given, but there was no statute requiring the giving of the notice, and, therefore, under the law it was no notice. An examination of each of those cases discloses the fact that no notice whatever was served upon either of the parties. In the Kuntz case he was subpenaed and testified as a witness. In the Eaton case the cashier of the bank was subpenaed and testified as a witness, and the knowledge that they respectively obtained in connection with this hearing was all the knowledge that they had, and no notice of the intention to assess had ever been issued or served upon either of them.

In *Loesch* v. *Kochler*, 144 Ind. 278, the question arose over the validity of a portion of Sec. 6 of the act of March 11, 1889. (Acts of 1889, pp. 375-7.) The act is in eight sections, Sec. 6 being Sec. 2202, and the act

itself embracing Secs. 2197 to 2204, Vol. I, Burns' Ann. Revision. It is exceedingly doubtful whether the last clause of Sec. 6 was within the title as required by the constitution of Indiana. It is certain that all of the remainder of the entire act is an act making the acts described misdemeanors, and this particular provision is inserted at the end of Sec. 6 without any provision whatever for notice to any person whatever or having any kind of inquest before the citizen. It is with respect to specific property, and we submit that it does not tend to throw any light upon the questions of error pending here.

At page 26 of the brief for plaintiff in error it is said in *Walston* v. *Nevin*, 128 U. S. 578, that the Kentucky statute was held valid because such assessments were made equitable only through a proceeding in court. I beg to submit that the case will be searched in vain to find that the action of this court was based upon that proposition. The law provided for the collection of the assessment through proceedings in court, and this court held that that constituted due process of law. If it said that it did so only because of that fact, I have been unable to find it in the reported case, and in this connection it is proper to say that Sec. 142 (8560), Sec. 169 (8587) and Sec. 171 (8589), while they are to be construed together, cover different phases of the process. Under Sec. 169 the amounts assessed under Sec. 142 are to be collected in the manner prescribed, where, as the supreme court of Indiana said in this case, there was every opportunity to the plaintiff in error to be heard as to the incorrectness of the assessment, and that brings it, so far as that process is concerned, within the specific language of the case of *Hagar* v. *The Reclamation District*, in 111 U. S. 701, *Walston* v. *Nevin*, *supra*, and the other authorities upon that particular process.

Sec. 171 (8589) prescribes another process; that is, it authorizes a levy by distraint and sale on property as in other cases, if such property can be found. That is not the case that is presented by this record, and even as to that the case is specifically within the language of Mr. Justice Miller in *McMillen* v. *Anderson*, 95 U. S. 37, and of Judge Jackson in *Scott* v. *The City of Toledo*, 36 Fed. 385, and of Judge Ricks in *Myers* v. *Shields*, 61 Fed. 713.

The supreme court of Indiana, in the case under consideration, points out the fact that in the proceeding before the court the plaintiff in error had full opportunity to be heard, and they also point out the fact, at p. 202, that the courts were open to him, even though he was a non-resident, to challenge the assessment by injunction, and that is what was done in the cases in 36 and 61 Federal.

In addition to the general remedy by injunction, the statute of Indiana afforded a complete remedy in the event the assessment was illegal. Secs. 7915, 7916 and 7917 of Burns' Ann. Revision, Vol. III, p. 622, provide:

"7915. In all cases where any person or persons or body politic or corporate shall appear before the board of commissioners of any county in this state, and establish, by proper proof, that such person or body politic or corporate has paid any amount of taxes which were wrongfully assessed against such person or body politic or corporate in such county, it shall be the duty of said board to order the amount, so proved to have been paid, to be refunded to said payer from the county treasury, so far as the same was assessed and paid for county taxes.

"7916. In all cases where a portion of the amount so wrongfully assessed and paid shall have been for state purposes, and shall have been paid into the state treasury, it shall be the duty of the said board of commissioners to certify to the auditor of state the amount so proven to have been wrongfully paid, under the seal of said board of commissioners; and the auditor of state shall, thereupon, audit the same as a claim against the treasury,

and the treasurer of state shall pay the same out of any moneys not otherwise appropriated.

"7917. If any board of county commissioners refuse to hear the proofs offered by any person or body politic or corporate, complaining or offering to complain before them, that he or it has been wrongfully assessed, the person or body politic or corporate so offering to complain shall have the same right of appeal from the decision of said board, so refusing to hear such complaint, that he or it would have in other cases."

By Sec. 7856, *Ib.*, it is provided:

"Any person or corporation feeling aggrieved with any decision of the board of county commissioners made as hereinbefore provided, may appeal to the circuit or superior court of such county, as provided by law. No appeal shall be from the decision of said board making allowances for services voluntarily rendered or things voluntarily furnished for the public use. From all other decisions for allowances an appeal may be taken within thirty days to the circuit or superior court of the county, the party giving sufficient bond against cost payable to said board. If a claim be disallowed in whole or in part, except where the claim is for services voluntarily rendered or things voluntarily furnished, the claimant may appeal, or, at his option, bring an action against the county; but if he shall not recover more on such appeal than is allowed, he shall pay the costs of such appeal."

See *Board of Commissioners, etc.*, v. *Senn*, 117 Ind. 410.
City of Indianapolis v. *Vajen*, 111 Ind. 240.
Newsom v. *The Board*, 103 Ind. 526.
DuBois v. *The Board*, 4 App. 138.
Douch v. *The Board*, *Ib.*, 374.

In *McMillen* v. *Anderson*, 95 U. S., p. 37, it was said by Mr. Justice Miller, at p. 42:

"Nor is the person charged with such a tax without legal remedy by the laws of Louisiana. It is probable

that in that state, as in others, if compelled to pay the tax by a levy upon his property, he can sue the proper party, and recover back the money as paid under duress, if the tax was illegal.

"But however that may be, it is quite certain that he can, if he is wrongfully taxed, stay the proceeding for its collection by process of injunction. See Fouqua's Code of Practice of Louisiana, Arts. 296-309, inclusive. The act of 1874 recognizes this right to an injunction, and regulates the proceedings when issued to stay the collection of taxes. It declares that they shall be treated by the courts as preferred cases, and imposes a double tax upon a dissolution of the injunction.

"But it is said that this is not due course of law, because the judge granting the injunction is required to take security of the applicant, and that no remedial process can be within the meaning of the constitution which requires such a bond as a condition precedent to its issue.

"It can hardly be necessary to answer an argument which excludes from the definition of due process of law all that numerous class of remedies in which, by the rules of the court or by legislative provisions, a party invoking the powers of a court of justice is required to give that security which is necessary to prevent its process from being used to work gross injustice to another."

I beg to submit that this case, which has been repeatedly approved by this court, is decisive of the questions here.

If the county treasurer, as he did not, had sought to avail himself of the remedies prescribed in Sec. 8989 by levying upon property instead of applying to the court for an order upon the executor, two remedies were open to the plaintiff in error: One, to pay his taxes under protest and file his claim with the board of commissioners under Secs. 7915, 7916 and 7917; the other, as pointed out by Mr. Justice Miller in *McMillen* v. *Anderson*, and pointed out by the supreme court of the state in this case, to apply for an injunction. Plaintiff in error did not see

fit to resort to either of these remedies, but waited until the petition was filed by the treasurer, as he was authorized to do in the court where the administration was pending, made up issues, elected to contest the constitutionality of the law in that case, and in that method rather than in others, and having failed to succeed, now presents the question to this court. We submit that there is no merit in the application, and that the judgment should be affirmed.

For some reason, the plaintiff in error has not presented to this court the evidence that was heard upon the trial of the case in the court below, and it therefore does not appear in this Transcript that the plaintiff in error was the residuary legatee of his decedent, and that, by virtue of his effort to have his official report approved and the estate settled, he was, as such residuary legatee, seeking to withdraw all the assets of said estate from the jurisdiction of the state of Indiana, leaving its omitted taxes unpaid. It does, however, appear from the opinion of the supreme court of Indiana that the plaintiff in error was the brother of the deceased, and was the residuary legatee, so that whatever should be deducted from said estate in the payment of said omitted and withheld taxes would, to that extent, be a diminution of the amount that he would withdraw from the state of Indiana by virtue of being the residuary legatee. It does appear affirmatively that for a long series of years, from 1881 to 1893, inclusive, the decedent had withheld from taxation and concealed from the taxing officers the amount of his wealth, and that his brother, the plaintiff in error, was and is willing to have the history of that written in the reported decisions of the supreme court of Indiana and of this court, in order that the magnificent estate of approximately a half million dollars that his dead brother had accumulated in a residence of nearly a third of a century

in Indianapolis might not be diminished by the taxes that he concealed and withheld from the authorities of the state. I submit that his action does not commend itself to this court, that the record is without error, that the taxes are justly, legally and constitutionally due and owing, and that, therefore, the judgment should be affirmed.

WILLIAM A. KETCHAM,
Of Counsel for Defendant in Error, and Special Counsel for the City of Indianapolis and of the School City of Indianapolis.

APPENDIX

The Tax Law of 1891 as amended in 1893, so far as applicable to any feature of this case.

SECTION 1. *Be It Enacted by the General Assembly of the State of Indiana,* That all taxes for the support of the government of this state shall be assessed on polls and on property listed and valued in an equal and ratable proportion (except such stocks and other property as may be specifically taxed) in the following manner, namely: The amount necessary and proper to be charged on each poll and on each hundred dollars' worth of property, for state expenditures and for school purposes, shall, from time to time, be fixed by law, and the amount to be charged on each poll and on each one hundred dollars' worth of property, for county expenditures, shall be determined by the board of county commissioners at their annual meeting in September. (Burns' Ann. Rev. of '94, Sec. 8408.)

SECTION 3. All property within the jurisdiction of this state, not expressly exempted, shall be subject to taxation. (Ibidem, Sec. 8410.)

SECTION 4. For the purpose of taxation, real property shall include all lands within the state, and all buildings and fixtures thereon and appurtenances thereto, except in cases otherwise expressly provided by law; personal property shall include all goods and chattels within the state, all ships, boats and vessels belonging to inhabitants of this state, whether at home or abroad, and their appurtenances; all goods, chattels and effects belonging to inhabitants of this state, situate without this state, except the property actually and permanently invested in business in another state, shall not be included; all indebtedness due to inhabitants of this state above the amounts respectively owed by them, whether such indebtedness is due from individuals or from corporations, public or private, and whether such debtors reside within or without the state; all shares in corporations organized under the laws of this state, when the property of such

corporation is not exempt or is not taxable to the corporation itself; all shares in banks organized in this state under any law of the United States, but in estimating the value of such shares deduction shall be made of the value of all real estate taxed to the bank; all shares in foreign corporations, except national banks, owned by inhabitants of this state; all moneys, all annuities and royalties, all interests owned by individuals in lands the fee of which is in this state or in the United States, except as hereinafter provided. Property exempted from taxation by the laws of the United States shall not be included. Shares in corporations, all the property of which is taxable to the corporation itself, shall not be assessed to the shareholder. Lands sold by the state, including lands forfeited to the sinking fund, university fund, and all other trust funds, though not granted or conveyed, shall be assessed in the same manner as if actually conveyed. All lands reserved to or for any individual by any treaty between the United States and any Indian tribe or nation shall be liable to taxation from the time such treaty shall have been confirmed. (Ibidem, Sec. 8411.)

SECTION 8. Personal property shall be listed for taxation between the first day of April and the first day of June, each year, and with reference to the quantity and quality held or owned on the first day of April, in the year for which the property is required to be listed. (Ibidem, Sec. 8418.)

SECTION 10. If a person die after the first day of April, in any year, without having given in the amount of his taxables, his executor or administrator, heir at law, or other person having charge thereof, shall give in the same as though such property had been in his possession on the first day of April of such year. (Ibidem, Sec. 8420.)

SECTION 11. All personal property shall be assessed to the owner in the township, town or city of which he is an inhabitant on the first day of April of the year for which the assessment is made, with the following exceptions: (Ibidem, Sec. 8421.)

First: All goods and chattels situated in some township, town or city, other than where the owner resides, shall be assessed in

the township, town or city where situated, and not elsewhere, if the owner or person having control thereof hires or occupies a store, mill, dock yard, piling ground, place for sale of property, shop, office, mine, farm, place of storage, manufactory or warehouse therein, for use in connection with such goods and chattels: *Provided*, That the procuring any such property to be manufactured upon contract, shall be deemed the hiring of a mill or manufactory, within the meaning of this section.

Second: All animals kept throughout the year in some township, town or city other than where the owner resides, shall be assessed to such owner, or the person in possession in the township, town or city where kept.

Third: All shares in banks shall be assessed to their owners in the city or town where the bank is located.

Fourth: Personal property of non-residents of the state shall be assessed to the owner or to the person having the control thereof in the township, town or city where the same may be, except that where such property is in transit to some place within the state, it shall be assessed in such place.

Fifth: The personal property of minors under guardian shall be assessed to the guardian in the township, town or city where the guardian resides, but shall not be assessed or taxed for city or town purposes unless the ward reside in such city or town, and the personal property of every other person under guardianship shall be assessed to the guardian in the township, town or city where the ward resides.

Sixth: The personal property of the estates of deceased persons in the hands of executors, administrators or other persons shall be assessed to the persons in charge of such property in the township, town or city where the deceased last dwelt, until such property has been distributed to the heirs or other persons entitled thereto. If such decedent was a non-resident of the state, such property shall be assessed in the township, town or city where situated.

Seventh: Personal property under the control of a trustee or agent, whether a corporation or natural person, may be assessed to such trustee or agent, except as otherwise by law provided in the township, town, or city in which such trustee or agent resides.

Eighth: All personal property of any person situate upon, also all buildings situate and being upon the land of the United States, or of this state, or upon the lands of any county, township, town, or city, shall be deemed personal property for such purposes of taxation and assessment, and shall be assessed as personal property to the owner or occupant thereof, in the township, town or city, to which said lands belong or of which they form a part, and such buildings shall be subject to sale for taxes in the same manner as herein provided for personal property: *Provided, however*, It shall not be necessary to remove such buildings for the purpose of sale.

SECTION 12. All corporate property, including capital stock and franchises, except where some other provision is made by law, shall be assessed to the corporation as to a natural person in the name of the corporation. The place where its principal office in this state is situated

shall be deemed its residence, but if there be no principal office in the state, then such property shall be listed and taxed at any place in the state where the corporation transacts business. (Ibidem, Sec. 8422.)

SECTION 13. For the purposes of assessing property and collecting taxes, a co-partnership shall be treated as an individual, and whenever the name of the owner or occupant of property is required to be entered upon the tax duplicate, if such property is owned or occupied by a co-partnership, the firm name may be used. A co-partnership shall be deemed to reside in the township, town or city where its business is principally carried on. Each partner shall be liable for the whole tax. (Ibidem, Sec. 8423.)

SECTION 14. Personal property *in transitu* shall be listed and assessed in the township, town or city where the owner resides: *Provided*, That if such property is intended for a particular business it shall be listed and assessed at the place where the property of such business is required to be listed and assessed. (Ibidem, Sec. 8424.)

SECTION 15. All persons, companies and corporations in this state owning or controlling steamboats, sailing vessels, wharf-boats, barges and other water craft shall be required to list the same for assessment and taxation in the county, township, town or city in which the same may belong, or be enrolled, licensed or registered, or kept when not enrolled, licensed or registered. (Ibidem, Sec. 8425.)

SECTION 16. The personal property of banks or bankers, corporate or unincorporated, brokers, stock jobbers, insurance companies, hotels, livery stables, saloons, eating-houses, ferries and mining companies, and all companies except companies specially provided for in this act, shall be listed and assessed in the township, town or city where such personal property is situated. (Ibidem, Sec. 8426.)

SECTION 17. The personal property of gas and coke companies, natural gas companies, electric light companies, water-works companies and hydraulic companies shall be listed and assessed in the township, town or city where the principal works are located; the mains, pipes and wires of such companies laid in or along roads, streets

or alleys shall be listed as personal property in the township, city or town where the same are laid or placed. (Ibidem, Sec. 8427.)

SECTION 18. The personal property of street railroad, plank road, gravel road, turnpike or bridge companies shall be listed and assessed in the township, city or town where the principal place of business is located. The track, road or bridge of such company shall be held to be personal property, and shall be listed and assessed in the township, town or city where the same is located or laid. (Ibidem, Sec. 8428.)

SECTION 19. Persons required to list property on behalf of others shall list it separately from their own, specifying in such case the name of the person, estate, company or corporation to whom it belongs. (Ibidem, Sec. 8429.)

SECTION 20. The personal property of persons removing from one county, township, town or city to another, between the first day of April and the first day of June in any year, shall be listed and assessed in either place in which the owner is first called upon by the assessor. The owner of personal property moving into this state from another state, between the first day of April and the first day of June, in any year, shall be listed for his poll and the property owned by him on the first day of April of such year, in the county, township, town or city into which he has so removed: *Provided*, That if such person has been assessed, and shall make it appear to the assessor by the certificate of the proper authority in the place of his former residence that he is held for tax for the current year in such former place of residence, he shall not again be assessed for such year. In case of doubt as to the proper place to assess personal property, if the doubt arises as to different townships in the county, the auditor shall determine the place; and if the doubt arises as to different counties, the auditor of state shall determine; such determination shall be summary and final. (Ibidem, Sec. 8430.)

SECTION 21. Real property shall be assessed in the place where situated, and to the owner, if known; if not, then to the occupant, if any; and if there be no occupant, then as unknown. Property in the control of an execu-

tor, administrator, guardian or trustee shall be assessed to such executor, administrator, guardian or trustee. (Ibidem, Sec. 8431.)

SECTION 22. When real estate is exempt from taxation in the hands of the holder of the fee and the same is contracted to be sold, the amount paid thereon by the purchaser, with the value of the improvements thereon until the fee is conveyed, shall be held to be personal property, and be listed and assessed as such in the place where the land is situated. (Ibidem, Sec. 8432.)

SECTION 23. The stock of nurseries, growing or otherwise, in the lands of nurserymen, shall be listed and asssessed as merchandise. (Ibidem, Sec. 8433.)

SECTION 24. When the deed for real estate is held for the payment of a sum of money, such sum so secured shall be held to be personal property, and shall be listed and assessed as credits. (Ibidem, Sec. 8434.)

SECTION 27. When personal property is mortgaged or pledged, it shall, for the purpose of taxation, be deemed the property of the person who has the same in possession. (Ibidem, Sec. 8437.)

SECTION 31. Whenever, at any time during any year, any transient person shall locate in any township, city, town or village, and shall offer to sell or otherwise dispose of any books or other goods, wares or merchandise, under the name of a gift, book store or any other name or designation, it shall be the duty of the proper assessor, for the time being, of the place where such person shall locate forthwith to call upon such person and demand of him the true value in money of all his stock in trade; and, in case such person shall neglect or refuse to return the same under oath within twenty-four hours after such demand, then it shall be the duty of said assessor to determine the same as in other cases; and in either case he shall forthwith return such valuation to the auditor of the county, who shall cause the same to be entered at once on the tax duplicate and collected immediately. (Ibidem, Sec. 8441.)

SECTION 33. Every person or company engaged in the business of receiving property in pledge, or as security for money or other thing advanced to pawner or pledger, shall be held to be a pawnbroker, and shall, at the time re-

quired by this act, return, under oath, the value of all property pledged and held by him as a pawnbroker on hand on the first day of April annually, and taxes shall be charged upon the true cash value of such property to such pawnbroker, the same as other property. (Ibidem, Sec. 8443.)

SECTION 34. For the purpose of properly listing and assessing property for taxation and equalizing and collecting taxes, the township assessor, county assessor, county auditor, auditor of state, boards of review and board of tax commissioners shall each have the right to inspect and examine the records of all public offices and the books and papers of all corporations and tax-payers in this state without charges, and they shall also have power to administer all necessary oaths or affirmation in the discharge of their duties; and it shall be the duty of all assessors, and all other officers charged with the duty of listing property for taxation, or charged with the duty of collecting taxes, to give in writing all information they may acquire in reference to the concealment of property from taxation by any person or corporation before mentioned to the county auditor, auditor of state, or to the boards of review or tax commissioners. (Ibidem, Sec. 8444.)

SECTION 44. In entering the personal property upon the proper tax books for the purpose of taxation, it shall be a sufficient description of the same to use the words "personal property," and such phrase shall comprehend and embrace all species of personal property belonging to the party charged therewith on the tax books, and no more specific description or designation thereof shall be necessary. (Ibidem, Sec. 8454.)

SECTION 48. On the first day of April of each year, or as soon thereafter as practicable, and before the first day of June, the assessor shall call upon each person required by this act to be assessed, and furnish him or her with the proper blanks for the purpose, and thereupon such person shall make to such assessor a full and correct description of all the personal property of which such person was the owner on the first day of April of the current year, and such person shall also, at the same time, make sepa-

rate, full and true statements in like manner, in writing, distinctly setting forth in each a correct description of all the personal property held, possessed or controlled by him as executor, administrator, guardian, trustee, receiver, partner, agent, attorney, president or accounting officer of a corporation, consignee, pawnbroker, or in any representative or fiduciary capacity, and he shall fix what he deems the true cash value thereof to each item of property for the guidance of such assessor, who shall determine and settle the value of each item, after examination of such statement, and also an examination under oath of the party or of any other person, if he deems it necessary. In determining and settling such valuation he shall be governed by what is the true cash value, such being the market or usual selling price at the place where the property shall be at the time of its liability to assessment, and if there is no market value, then the actual value.

In making the valuation, annuities and royalties shall be valued at their present cash value. For the purpose of making such statements the person to be assessed shall receive the proper blanks from the assessor. (Ibidem, Sec. 8458.)

SECTION 49. The person called upon or required by the assessor to list property shall answer, in writing, under his signature, the following interrogatories, under oath, upon the proper blank form thereof, to be furnished by the assessor, who shall also administer the oath:

Interrogatory One: **Are you or were you, on the first day of April of the present year the executor of the last will, or the administrator of the estate of any deceased person, or the guardian of the estate of any infant or person of unsound mind, or the trustee of the property of any person, or the receiver of any corporation, association or firm, or the agent or attorney or banker, investing, loaning or otherwise controlling the money or other property of any other person, resident in this state, or the president or accounting officer of any corporation, or a partner, consignee or pawnbroker? If yes, designate for whom you were then or are now acting in such representative or fiduciary capacity, and if you were, or are now, acting under the authority of any particular court, name the court, and also state to what court you report.**

Interrogatory Two: **Have you, before the first day of April of the present year, either personally or through the agency of others, caused all or any part of your taxable money or other property to be temporarily converted, either by sale, borrowing,**

exchange or in any other manner, into United States notes not taxable, commonly called "greenbacks," or bonds or other securities of the United States, not taxable, or any other property not taxable, with the intention to pay back, return or exchange, or sell back such property after you have made out your tax statement for the purpose of evading the payment of taxes on such property, or did you on or after the first day of April of the present year, and before you saw this interrogatory, pay back, return or re-exchange or sell back such property for the purpose aforesaid?

Interrogatory Three: If you have converted any of your money or property, or money or property of any other person as inquired of you, then state when the same was so converted or invested and the kind and the amount or value thereof.

A space shall be left on the blank under each interrogatory, for the answer to the same. (Ibidem, Sec. 8459.)

SECTION 50. Every person required by this act to make or deliver such statement or schedule shall set forth an account of the property held or owned by him, as follows:

PERSONAL PROPERTY—CREDITS.

First. All annuities and royalties.

Second. All bonds, notes, mortgages, accounts, demands, claims and other indebtedness owing to such person, whether such indebtedness is owing from individuals or from corporations, public or private, and whether such debtors reside within or without the state, including all deposits in banks or with other corporations or with individuals.

Third. All *bona fide* indebtedness owing by such person.

PERSONAL PROPERTY—CHATTELS.

First. All shares in banks organized in this state under any law of this state, or of the United States, and their full market value, after deducting the value of the real estate as taxed to the banks.

Second. All shares in foreign corporations, other than banks, and their value.

Third. All shares in other corporations organized under the laws of this state, when the property of such corporation is not exempt by some law, or is not taxable to the corporation itself, and the cash value of such shares.

Fourth. All moneys.

Fifth. The value of all gold and silver plate, watches, diamonds and jewelry.

Sixth. The value of all household furniture and musical instruments.

Seventh. All patent rights, describing them, and giving the number of each patent, and the value of each.

Eighth. The number and kinds of domestic animals and their value.

Ninth. All wagons, carriages and sleighs and their value.

Tenth. All mechanical and agricultural implements and tools, and their value.

Eleventh. All machinery not affixed to real property and its value.

Twelfth. All ships, boats and vessels, whether at home or abroad, and their value.

Thirteenth. All merchandise and stock in trade and its value.

Fourteenth. All logs, timber, lumber, posts, ties, cordwood, staves, or other felled or cut timber, and the value.

Fifteenth. All other goods, chattels and personal property, not heretofore specifically mentioned, and their value, except property specifically exempt from taxation. (Ibidem, Sec. 8460.)

SECTION 51. In every case where any person shall neglect or refuse to make out and deliver a sworn statement of his property to the assessor, as required by this act, or if the assessor shall be in doubt whether such statement is correct, such assessor is hereby authorized and required to examine on oath any other person whom he believes to have knowledge of the amount or value of any property owned or held by such person so neglecting or refusing; and such assessor is authorized to set down and assess to such person such amount of personal property as he may deem just. (Ibidem, Sec. 8461.)

SECTION 53. Before the first day of April of each year the county auditor shall have in readiness for delivery to the assessor the proper assessment books and necessary blanks for the assessment of all property, real and personal. The schedule, with affidavits thereto attached, to be signed by the party, shall be in the following form, the names and places being changed to suit each person: The words "value," "cash value," "true value," or "valuation," whenever used in this act, shall be held to mean the usual selling price at the place where the property to which such term or terms are applied shall be at the time of assessment, being the price which could be obtained therefor at private sale, and not at forced or auction sale. The party shall write the word "none" after each item whenever he has no property to assess as named in such item, and no item shall be passed without being answered. (Ibidem, Sec. 8463.)

SCHEDULE

Of all property held by ———, of ——— township, ——— county, Ind., on the 1st day of April, 189—.

PERSONAL PROPERTY—CREDITS.

No.	Description of Property.	Valuation by Party.	Valuation by Assessor.
1	All annuities ..... $		
2	All bonds ..... $		
3	All notes secured by mortgage ..... $		
4	All other notes ..... $		
5	All accounts ..... $		
6	All demands and claims ..... $		
7	All deposits in banks ..... $		
8	All deposits with other corporations .. $		
9	All deposits with individuals ..... $		
10	All other amounts due me from any person or corporation ..... $		
	Total credits due me ..... $		
	From the sum of the above credits I claim a deduction of the amount of my *bona fide* indebtedness, to wit:		
	Total indebtedness which should be deducted from any credits ..... $		
	Leaving balance for which I should be assessed ..... $		

PERSONAL PROPERTY—CHATTELS.

1	Money on hand or subject to my order not already entered under title of "credits"		
2	All money loaned by me and not already entered on this schedule		
3	All interest owing me not entered on this schedule		
4	All judgments or allowances in my favor, entered in any court, and which I have not already entered on this schedule: also, all legacies, bequests and other estates in expectancy		
5	All shares of stock in any corporation formed outside of this state: and also all shares of stock in any corporation formed in this state, and conducting its business outside of this state		
6	Value of goods and merchandise on hand		
7	Value of all articles purchased, received or otherwise held for the purpose of being used, in whole or in part, in any process or operation of manufacturing, combining, rectifying or refining		

No.	Description of Property.	Valuation by Party.	Valuation by Assessor.
8	Value of manufactured articles on hand.....		
9	Value of manufactured tools, implements and machinery (other than engines and boilers, which shall be listed as such).....		
10	Value of agricultural tools, implements and machinery.....		
11	Value of gold or silver plate and plated ware...		
12	Value of diamonds and jewelry.....		
13	Value of household furniture and library.....		
14	Value of mechanical tools, law and medical books, surgical instruments and medicines...		
15	Value of nursery stock		
16	Value of property such person is required to list as pawnbroker.....		
17	Value of property of companies and corporations other than property hereinbefore enumerated.		
18	Value of property of saloons and eating houses.		
19	Value of market garden products.....		
20	Value of home-made manufactures		
21	Value of slaughtered animals.....		
22	Every franchise and description and value.....		
23	Value of brick, stone and all other building material on hand		
24	Number of steamboats, sailing vessels, wharf-boats, canal-boats, barges, or other water craft, either within or without this state, and value		
25	Number of patent-rights and value		
26	Number of steam engines, including boilers, and value		
27	Number of fire and burglar-proof safes and value		
28	Number of billiard, pigeon-hole, bagatelle and other similar tables and value.....		
29	Number of pianofortes and other musical instruments and value.....		
30	Number of sewing or knitting machines and value		
31	Number of watches and clocks and value		
32	Number of carriages, wagons, coaches, hacks, carts, drays or other vehicles and value		
33	Number of hoop-poles and value.....		
34	Number of horses and value.....		
35	Number of mules, jacks and jennets and value.		
36	Number of cattle and value.....		
37	Number of sheep and value.....		
38	Number of hogs and value.....		
39	Number of cords of wood and value.....		
40	Bushels of coal and value		
41	Bushels of lime and value.....		
42	Bushels of wheat and value		
43	Bushels of corn and value.....		
44	Bushels of rye and value.....		

No.	Description of Property.	Valuation by Party.	Valuation by Assessor.
45	Bushels of oats and value		
46	Bushels of potatoes and value		
47	Bushels of barley and value		
48	Bushels of grass and clover seed and value		
49	Bushels of flaxseed and value		
50	Bushels of fruit and value		
51	Tons of hay and value		
52	Tons of hemp and value		
53	Pounds of beef and value		
54	Pounds of bacon and value		
55	Pounds of bulk pork and value		
56	Pounds of lard and value		
57	Pounds of wool and value		
58	Pounds of tobacco and value		
59	Pounds of hops and value		
60	Pounds of maple sugar and value		
61	Barrels of beef and value		
62	Barrels of pork and value		
63	Gallons of cider and value		
64	Gallons of vinegar and value		
65	Gallons of wine and value		
66	Gallons of sorghum or maple molasses and value		
67	Feet of lumber and value		
68	Pounds of starch and value		
69	Pounds of feed and value		
70	Reams of paper and value		
71	Pounds of pulp and value		
72	Gallons of oils of all kinds and value		
73	Number of scales and value		
74	Number of yards of cloth and value		
75	Number of yards of flannel and value		
76	Number of blankets and value		
77	Pounds of yarn and value		
78	Tons of ice and value		
79	Number of threshing machines and value		
80	Number of corn shellers and value		
81	Value of logs, timber and all other property, not specified above, required to be listed		
82	Male dogs owned or harbored by me		
83	Female dogs owned or harbored by me		

TO THE ASSESSOR.

The following is a list of all persons in my family, and belonging to my township, who are deaf and dumb, blind, idiotic, or insane, with their names, ages and sex, and also the name of the father, mother or guardian, and their postoffice address:

Name.	Age.	Sex.	Whether Deaf and Dumb, Blind, Idiotic or Insane.	Name of Father, Mother or Guardian.	Postoffice Address.

State of Indiana, ——— county, ss:

I, ———, being duly sworn, say, to the best of my knowledge, information and belief, the foregoing statement contains a true, full and complete list of all property held or belonging to me, and dogs owned, kept or harbored by me, on the first day of April, including all personal property, appertaining to merchandising, whether held in actual possession or only having been purchased with a view to possession or profit, and all personal property appertaining to manufacturing, and all manufactured articles, whether on hand or owned by me. In all cases where I have been unable to exhibit certain classes of property to the assessor, such property has been fully and fairly described, and its true condition and value represented. That I have in no case sought to mislead the assessor, as to either quantity or quality or value of property, and that the deductions claimed from credits are *bona fide* debts for a consideration received and do not consist in any part in bonds, notes or obligations of any kind given to any insurance company on account of premium or policies, nor on account of any unpaid subscription to any literary, scientific or charitable institution or society, nor on account of any subscription to, or indebtedness payable on capital stock of any company, whether incorporated or unincorporated; and I further swear that since the first day of April of last year, I have not directly or indirectly converted or exchanged any of my property temporarily, for the purpose of evading the assessment thereof for taxes, into non-taxable property, or securities of any kind.

I further swear that I have to the best of my knowledge and judgment valued said property at its true cush value, by which I mean the usual selling price, being the price which could be obtained for said property at private sale, and not at forced or auction sale.

———————

Subscribed and sworn to before me this —— day of ——, 189—.

————————, Assessor.

By ————————, Deputy.

SECTION 56. In every case where any person shall refuse to make out and deliver to the proper assessor the statement required under this act, or shall refuse to take and subscribe to any of the oaths or affirmations required by this act, the assessor shall proceed to ascertain the number of each description of the several enumerated articles of property and the value thereof, and for this purpose he may examine on oath any person or persons whom he may suppose to have knowledge thereof, and such assessor shall make a note of such refusal in a column opposite the person's name, and the county auditor shall add to such valuation when returned by the assessor fifty per centum on the value so returned. (Ibidem, Sec. 8466.)

SECTION 58. When any person shall have been prevented from making and verifying his statement by reason of sickness or absence from the county during the sixty days, and the assessor shall have made a statement for him, he may, at any time before the assessment of taxes thereon by the county auditor, make, verify and file with the county auditor the proper statement; but in such cases, before the auditor shall receive such statement, the person making the same must add to the ordinary affidavit a statement to the effect that his failure to give to the assessor such statement was occasioned by his sickness or absence, and if from absence, that such absence was without design to avoid the listing of his property, and on the filing of such statement the auditor shall correct the statement made by the assessor. (Ibidem, Sec. 8468.)

SECTION 90. For the purpose of listing and assessing all property for taxation there shall be elected at the township election in the year one thousand, eight hundred and ninety-four, and every four years thereafter, in each township of the several counties in this state, an assessor for such township, who shall hold his office for the term of four years from the first Monday of August following and until his successor is elected and qualified. Within ten days after the beginning of his term he shall give bond with at least two good and sufficient freehold sureties, to the acceptance of the county auditor, in the sum

of three thousand dollars, payable to the state of Indiana, and conditioned for the faithful and impartial discharge of his duties according to law, and shall take and subscribe an oath or affirmation, to be indorsed on his bond, that he will faithfully, honestly and impartially discharge the duties of his office to the best of his skill and ability; and the bond so indorsed shall be deposited with the county auditor, and the said auditor is hereby authorized to administer the oath of office aforesaid. If such bond and oath are not given and filed in the county auditor's office within said ten days, the office shall be vacant, and the county auditor shall at once fill such vacancy by appointment, and such appointee shall give the bond and take the oath as above required. And if from any other cause a vacancy should occur in said office in any township, at any time, the county auditor shall fill such vacancy by appointment, and the person so appointed shall qualify as herein required. All township assessors last elected or appointed shall continue in office until the next township election, and until their successors are elected and qualified under this act, at the same rate and limit of compensation as herein provided. Persons holding the office of township assessor on the taking effect of this act shall not be eligible to said office at said township election in 1894; and hereafter no person shall be eligible to the office of township assessor more than four years in any period of eight years. The oath of office to be taken by said assessor and indorsed upon his bond shall be in the words following:

State of Indiana, county of ———, ss:

I, ———, do solemnly swear that I will support the constitution of the United States, and the constitution of the state of Indiana, that I will faithfully, impartially, and honestly discharge the duties of my office as township assessor, particularly that I will assess all property assessed by me at its true cash value, as such value is defined in Section 53 of the act concerning taxation, according to my best knowledge and judgment, so help me God.

Subscribed and sworn to before me this —— day of ———, 189—.

————, County Auditor.

All deputy assessors shall be sworn in like manner. (Ibidem, Sec. 8508.)

SECTION 91. Whenever a township assessor shall be unable to complete the duties required of him within the time designated by law, he may appoint one or more suitable and competent persons as deputies to assist him in making the assessment, and he may designate the portion of the township, town or city in which they shall act. Such deputies shall make their return to the proper assessor. (Ibidem, Sec. 8509.)

SECTION 92. For their services the township assessors shall receive as compensation two dollars per day for the time actually employed in the duties of their office, not exceeding sixty days in any one year, to be paid to them from the county treasury upon the warrant of the county auditor, and they shall receive no extra allowance for their services. Their deputies shall also receive two dollars per day for each day they are actually employed, to be paid them in like manner: *Provided, however,* That in townships having a population of more than one hundred thousand, as shown by the last preceding United States census, the deputies that are necessarily engaged in the performance of the office work of such office shall receive a compensation for such work of three dollars per day for each day they are actually employed, to be paid as provided in this section: *Provided, further,* That nothing in this section shall be taken to alter or repeal any of the provisions of an act fixing the salaries of county commissioners, township assessors and trustees, approved March 6, 1889. (As amended March 4, 1893.) (Ibidem, Sec. 8510.)

SECTION 105. Each assessor shall, on or before the first Monday of June, annually, make out and deliver to the auditor of his county, in tabular form and alphabetical order, a list or lists of the names of the several persons, companies or corporations in whose names any personal property, moneys, credits or other taxables shall have been listed, on which list or lists he shall enter separately, in appropriate columns opposite each name, the aggregate value of the several species of personal property and taxables required to be listed as attested by the person required to list the same or as determined by the assessor, making separate lists of persons residing out of

any incorporated city or town and of any persons who are residents of an incorporated city or town.

The columns shall be accurately added up.

To such return shall be attached the following oath or affirmation, to be made by himself or his deputy, and certified by the county auditor or other officer administering the same:

I, ———, assessor for ——— township, ——— county, in the state of Indiana, do solemnly swear (or affirm) that the value of all personal property, moneys, credits and other assessables, of which a statement has been made and attested by oath or affirmation of the person required by law to list the same, is truly returned as set forth in such statement; that in every case where by law I have been required to ascertain the amount and value of personal property and assessables of any person, company or corporation, I have diligently, and by the best means in my power, endeavored to ascertain the true amount and value of such personal property and assessables, and that, as I verily believe, the full value thereof so ascertained by me and estimated by the rule prescribed by law, particularly by Section 53 of the act concerning taxation, is set forth in the annexed return; that in no case have I knowingly omitted to demand a statement of the description and value of personal property or of the amount of moneys and credits, or of the amounts and value of other stocks or bonds or other assessables, which any person is required by law to list; nor have I in any way connived at any violation or evasion of any of the requirements of law in relation to listing or valuing the personal property, moneys, credits, stocks or other assessables for taxation. (Ibidem, Sec. 8523.)

SECTION 106. When the returns of the assessors are received, the county auditor, if satisfied that such assessor has omitted any personal property, moneys, rights, credits, effects, stocks or real estate in his township which it was his duty to return, may, if he deems it expedient, authorize and require such assessor to proceed to correct any error or omission which may have occurred as aforesaid, and in such case such assessor shall, within ten days after being so required and authorized, proceed to correct such errors and omissions and make returns thereof to such county auditor; but nothing herein contained shall athorize any assessor to reduce the amount assessed against any person in his former return, or the auditor may himself ascertain the value and add the same to the assessment, and such county auditor shall charge such

person with the additional amount, if any, returned by such assessor. (Ibidem, Sec. 8524.)

SECTION 108. Whenever the township assessor, prior to the filing of his return with the county auditor, shall discover or receive credible information, or have reason to believe that any real or personal property has been omitted in the assessment of any year or number of years from the listing and assessing, or from the tax duplicate, or that any person, company or corporation has from any cause omitted to list any part of his, her or their property, or has not returned the full value thereof, or that the tax for which such property was liable from any cause has not been paid, or that any real estate, by reason of defective description thereof, has failed to pay taxes for any year, or number of years, he shall proceed to correct his list and add such property to the assessment, so that such property and the owner thereof may be charged with the proper amount of taxes thereon; but, before making such correction or addition, if the person claiming to own such property, or occupying it, or in possession thereof, resides in the county, he shall give the person claiming to own, or occupying, or having in possession such property, notice in writing of his intention to list such property, describing it in general terms, and requiring such person to appear before him at his office, or place of business, at a specified time within ten days after giving such notice, to show cause, if any, why such property should not be listed and placed on the assessment book; and if the party so notified does not appear, or if he appear and fail to show to any good and sufficient cause why such assessment should not be made, such listing shall be made and the particular years for which such property should be listed shall be noted. Such assessor shall also file with the county auditor a statement in writing of his reasons for making such correction or assessment, and the facts or evidence upon which such reasons were based; the arrearages of tax which might have been assessed shall be charged against such person and property by the county auditor. The county assessor hereinafter provided for shall at any time during any year

have the power and exercise the duties in this section prescribed for township assessors. (Ibidem, Sec. 8526.)

SECTION 109. A failure to complete or return an assessment of property, real or personal, by the township assessor, within the time required by this act, or any informality or irregularity in making the assessment, or in the tax lists, or errors of any kind therein, shall not vitiate the same, but the same shall be as legal and valid as if completed and returned in the time required by law, and such informalities or irregularities may be corrected at any time after such return is made, and if any property is listed or assessed on or after the first day of June, and before the return of the assessor's books, the same shall be as legal and binding as if listed and assessed before that time, but nothing in this section shall be so construed as to release such assessor from any penalty imposed upon him by law for his neglect or failure to make his return within the period prescribed by this act. (Ibidem, Sec. 8527.)

SECTION 110. Each assessor shall, at the time he makes return of taxable property to the county auditor, also deliver to him all the statements of property which he shall have received from persons required to list the same, arranged in alphabetical order, corresponding with his list or lists, and also all the plats used in assessing real estate; and the auditor shall carefully preserve the same in his office. (Ibidem, Sec. 8528.)

SECTION 112. There shall be elected on the first Tuesday after the first Monday in November, 1892, and every four years thereafter, in each county in this state, one county assessor, who shall possess the powers and perform the duties hereinafter specified; and no person shall be eligible for re-election more than once in any term of eight (8) years. Such county assessor shall be a resident freeholder and householder of the county not less than four (4) years before the date of such election. Within ten days after his election he shall give bond with two or more good and sufficient freehold sureties, to be approved by the county auditor, in the sum of five thousand dollars ($5,000), payable to the state of Indiana, and conditioned for the faithful and impartial discharge

of his duties, and shall take and subscribe to an oath or affirmation, to be indorsed on his bond, that he will faithfully and impartially and honestly discharge the duties of his office, which oath shall be in the form, as near as may be, of the oath of township assessors, as set out in section 90 of this act. Said bond shall be deposited with the county auditor, who shall administer the oath indorsed thereon. If any vacancy shall occur in said office the board of county commissioners shall fill the same at any regular (or) special session. Each county assessor shall receive three dollars ($3.00) per day for the time actually employed in the duties of his office, to be paid out of the county treasury on order of the board of county commissioners, on his filing therewith an itemized statement duly verified, showing the time actually employed by him and the nature of his services: *Provided*, That in counties having a population of more than one hundred thousand the county assessor shall receive $1,800 per annum, to be paid out of the county treasury, and he shall keep his office open each and every business day during the year, and shall be authorized to appoint one deputy, who shall receive two dollars and fifty cents per day, to be paid out of the county treasury, upon proper allowance to be made by the board of county commissioners. (As amended March 1, 1893.) (Ibidem, Sec. 8530.)

SECTION 113. As soon as such county assessor has qualified, he shall receive from the county auditor all returns of real and personal property made by the assessors of the several townships of the county, together with all assessment lists, schedules, satements, maps and other books and papers filed with the auditor by said township assessors. It shall be the duty of such county assessor to make a careful examination of the tax duplicate of the county, and also of all other records and papers in the offices of the county auditor, treasurer, recorder, clerk, sheriff and surveyor, and to list and assess, at its true cash value, upon the proper township assessor's books and to the proper persons, all omitted assessable property, of every kind and nature whatsoever, including tax certificates, mortgages, debts, judgments, claims and allowances of courts and legacies and property in the hands of

administrators, executors, guardians, assignees, receivers, trustees and other fiduciaries. The valuation made on any omitted property by the county assessor shall be entered in a separate column under the head of "Valuation by County Assessor" immediately after the column containing the valuation by the township assessor in the several lists and returns of said township assessors. The county assessor shall have all the rights and powers given by law to township assessors for the examination of persons and property, and the discovery and assessment of property, and making lists and returns of the same. He shall, on or before the first Monday after the 4th day of July in each year, make returns to the county auditor of all township assessors' books, returns, lists, schedules, maps and other papers received by him from the auditor, together with such additional lists, assessments, books and papers as he has made thereto; and all assessments so made by the county assessor shall have the same force and effect as if made in the first instance by the township assessor. It shall also be the duty of the county assessor, at any time during the year, to list and assess upon the proper assessor's books in the office of the county auditor any omitted property that he may discover and which should be assessed; and the same shall be placed upon the duplicate by the auditor, and the taxes thereon extended and collected as in other cases. The county assessor is hereby authorized and required to advise and instruct all township assessors of his county as to their duties under the law, and for this purpose he shall visit each township assessor during the months of April or May in each year. The county assessor is also given all the powers hereinafter given to county auditors and treasurers as to assessment of omitted property after the meeting and adjournment of the board of county review in each year, and all provisions of sections 142 and 182 of this act, as to notice or otherwise, so far as applicable, shall apply to such assessment by the county assessor as if the same were made by the county auditor or the county treasurer. On order of the county commissioners, duly entered of record at any regular or special meeting of the board, the county assessor may appoint one or more deputies to serve such

time, not exceeding thirty days in any one year, as the commissioners shall direct, who shall have the same qualifications, possess the same powers and perform the same duties as the assessor, subject to his control and direction. They shall receive such compensation as the county commissioners shall fix, not to exceed two dollars per day. (Ibidem, Sec. 8531.)

SECTION 114. There shall be an annual board for the review of all assessments and the equalization of the valuation of real and personal property in each county. Such board shall be composed of the county assessor, county auditor and county treasurer. The county assessor shall be president and the county auditor secretary of said board, which shall be known as the "county board of review." The board shall meet for assessment, review and equalization of taxes at the room of the county commissioners in the court-house of each county, on the first Monday after the fourth day of July annually. Two weeks' previous notice of the time, place and purpose of such meeting shall be given by the county auditor in some newspaper of general circulation, printed and published in the county; or, if no newspaper be published in the county, then by posting up notices in three public places in each township in the county. Such board shall have the power to hear complaints of any owner of personal property, except "railroad track" and rolling stock" of railroads, to equalize the valuation of property and taxables made subsequent to the preceding first day of April, and to correct any list of valuation as they deem proper. It shall also have power to equalize the valuation made by the assessors, either by adding to or deducting therefrom, such sums as are necessary to fix the assessment at the true cash value. In all cases where the county board deems it necessary to add omitted property, or to increase the valuation thereof by the assessor, it shall cause the names of the persons to whose lists property is to be added, or the valuation of whose property is to be increased, to be inserted in the notice hereinbefore provided for; or such board may, at its option, cause to be served upon the person to whose list property is to be added, or the valuation of whose property is to be in-

creased, a written notice that it is proposed to revise or correct his list, but such notice need not specify the particulars in which it is proposed to revise or correct the list or returns, nor shall it be necessary to specify particularly in the published notice, but it shall be sufficient in any or all such notices to state generally that it is proposed to correct or revise the returns, list, statement or schedule of the person or persons named. In case such county assessor neglects to give the written notice herein provided for, it shall be issued by the auditor to the sheriff of the county, who shall serve the same at least three days before the same comes up for hearing. In case the board adjudges that the returns, statement or schedule list shall be revised or corrected by adding property thereto, or by increasing the valuation of any property therein described, the tax-payer whose list, return, statement or schedule it adjudges shall be revised or corrected as aforesaid shall be liable for all costs occasioned by such revision or correction. The board shall correct all errors in the names of persons in the descriptions of property upon said list, and in the assessment and valuation of property thereon, and shall cause to be done whatever else may be necessary to make said lists and returns of assessments comply with the provisions of this act. It shall pass upon each valuation, and may, on sufficient cause being shown, or on its own motion, correct the assessment or valuation of any property in such manner as will, in its judgment, make the valuation thereof just and equal, and enter the valuation, when so changed by it, in a separate column. In all cases where a change has been made by it, or omitted property placed by it on the returns, two weeks' previous notice of the time, place and purpose of the meeting of the board of review shall be given by the county assessor. A majority of said board shall constitute a quorum for the transaction of business, and may decide any question. Before entering upon their duties the members of the board of review shall each take and subscribe an oath for the faithful and impartial discharge of their duties as members of said board, which oath shall be administered by the auditor to the assessor and treasurer, and by the assessor to the auditor,

and shall be filed with the auditor, and shall be in the form following:

State of Indiana, ——— county, ss:

I, ———, do solemnly swear that I will support the constitution of the United States and the constitution of the state of Indiana, and that I will faithfully and impartially discharge my duty as a member of the board of review for said county; that I will, according to my best knowledge and judgment, assess, review, and equalize the assessment of all the property of said county, and that I will in no case assess any property at more or less than its true cash value, as such value is defined by Section 53 of the act concerning taxation, so help me God. _____

Subscribed and sworn to this —— day of ———, 18—. _____

At such meeting the county auditor shall submit to the board of reivew the assessment lists of the county as returned by the township assessors and added to and returned by the county assessor for the current year; and the board shall proceed to examine and review the same. In addition to his other duties, it will be the duty of the county assessor to report to the board of review, for the action of the board, all corrections and changes in the returns and assessments of the township assessors, which in the judgment of the county assessor ought to be made. The board of review will consider and act upon all recommendations made by the county assessor, and will also, of its own motion, or on sufficient cause being shown by any person, add to the assessment lists the names of persons, the value of personal property, and the description and value of real estate liable to assessment and omitted on said lists. The board shall correct all errors in the names of persons, in the descriptions of property upon said lists, and in the assessment and valuation of property thereon, and shall cause to be done whatever else may be necessary to make said lists and returns of assessments comply with the provisions of this act. The board shall pass upon each valuation and enter the valuation as fixed by it in a separate column. The lists as prepared by the assessors shall stand as approved and adopted as the act of the board of review, except as changed by a vote as herein provided. The board may, on sufficient cause being shown, or on their own motion, correct the

assessment or valuation of any property in such manner as will in their judgment make the valuation thereof just and equal. To that end the board may examine, on oath, any person touching the matter. Any member of said board may administer such oath. Said board is hereby given full power to send for persons and papers and to compel witnesses to answer, under oath, touching any question concerning the assessment and valuation of property. The sheriff of the county shall serve all process and obey all orders of said board, and the board is given power to punish for contempt, by fine not to exceed one hundred dollars and imprisonment in the county jail not exceeding ten days, all persons refusing to appear (and testify before the board). (An appeal) shall lie to the circuit court of the county from all orders of the board inflicting such punishment, which appeal shall be governed by the laws providing for appeals in criminal cases from justice of the peace so far as applicable. Nothing, however, in this section shall be taken or construed to authorize the board to assess any property at more or less than its true cash value as the same is defined in section 53 of this act. Where it appears from the returns of the assessors, or from the corrections made in said return by the board that any property owner has a *bona fide* indebtedness, the same shall be deducted from the amount of his credits listed in the county, and he shall be assessed only on the residue of his credits, which residue shall be fixed by the board of review. (Ibidem, Sec. 8532.)

SECTION 115. It shall be the duty of such board, at such meetings, to inquire as to the valuation of the various classes of property in the respective townships and divisions of the county, and to make such changes, whether by way of increase or decrease in such valuation, as may be necessary to equalize the same as between the townships or divisions of townships, and to determine the rate per cent. to be added or deducted in order to make a just and equitable equalization in the respective townships and divisions, so as to conform throughout the counties to a just and equitable standard, reference being had to the natural and artificial characteristics and surroundings and other elements of value. Such board

shall also have power in proper cases to reduce or increase the valuation of any particular tract or lot. Such board may consider lands, town lots and city lots as separate classes if necessary, for the purpose of equalization and determine a per cent. of addition or reduction for such or any of said classes within the respective townships as between the several townships or other divisions. The board shall have no power to reduce the aggregate valuation of all the townships below the true cash value, nor increase the same beyond the amount actually necessary for a proper and just equalization. If the board shall find the aggregate assessment is too high or too low, or is generally unequal as to render it impracticable to equalize the same, it may set aside the assessment of the whole county or any township or townships therein and order a new assessment, with instructions to the assessors to increase or diminish the aggregate assessment of their respective townships in such amount as the board may deem right and just and consistent with law. The duration of the session of the board of review shall not exceed eighteen days. (Ibidem, Sec. 8533.)

SECTION 142. Whenever the county auditor shall discover or receive creditable information, or if he shall have reason to believe that any real or personal property has from any cause been omitted, in whole or in part, in the assessment of any year or number of years from the assessment books or from the tax duplicate, he shall proceed to correct the tax duplicate and add such property thereto, with the proper valuation, and charge such property and the owner thereof with the proper amount of taxes thereon, to enable him to do which he is invested with all the powers of assessor under this act. But before making such correction or addition, if the person claiming to own such property or occupying it, or in possession thereof, resides in the county, and is not present, he shall give such person notice in writing of his intention to add such property to the tax duplicate, describing it in general terms, and requiring such person to appear before him, at his office, at a specified time within five days after giving such notice, and to show cause, if any, why such property should not be added to the tax duplicate;

and if the party so notified does not appear, or if he appears and fails to show any good and sufficient cause why such assessment shall not be made, the same shall be made, and the county auditor shall in all cases file in his office a statement of the facts or evidence on which he made such correction; but he shall in no case reduce the amount returned by the assessor without the written consent of the auditor of state given on the statement of facts submitted by the county auditor. (Ibidem, Sec. 8560.)

SECTION 147. He (the county auditor) shall from time to time correct all errors which he may discover in his duplicate, either in the name of the person charged with taxes, the description of the property or the amount of the tax charged, and shall add from time to time any corrections or additional assessments made on the assessor's books by the county assessor, and when such correction is made after the duplicate shall have been delivered to the treasurer for collection, the auditor shall give a certificate of such correction to the treasurer, who shall make a like correction on his duplicate and keep such certificate as his voucher on settlement with the auditor. (Ibidem, Sec. 8565.)

SECTION 151. Such treasurer shall attend at his office at the seat of justice, in person or by deputy, for the purpose of collecting the taxes charged on said duplicate, until the third Monday of April next thereafter. (Ibidem, Sec. 8569.)

SECTION 152. Any person or tax-payer charged with taxes on the tax duplicate in the hands of a county treasurer may pay the full amount of such taxes on or before the third Monday in April, or may, at his option, pay the first installment on or before such third Monday, and the remaining installments on or before the first Monday of November following: *Provided, however*, That all road taxes charged shall be included in the first installment; and, *Provided further*, That in all cases where the first installment shall not be paid on or before the third Monday in April the whole amount unpaid shall become due and be returned delinquent, and collected as provided by law, and there shall be a penalty added of ten per cent. upon the amount of any installment not paid when due.

which the persons or property assessed shall pay, together with cost of collection, and if such taxes remain delinquent at the succeeding first Monday in November, there shall be a penalty of six per centum added to all such taxes that become delinquent at the preceding April and November settlements, and a penalty of ten per centum only shall be added to the current delinquency occurring on the first Monday in November. (Ibidem, Sec. 8570.)

SECTION 153. After the third Monday of April the treasurer shall cause a list to be made of the delinquents, with the amount due from each, and with a separate column headed "return," which list shall be certified to be correct by the county auditor, and shall then proceed with such list, which when so certified shall be sufficient authority and have the same force and effect as an execution to call, either in person or by deputy, upon every person named in the duplicate who is delinquent and who resides in the county, and he shall make a demand for the amount of such delinquent taxes, and the penalty thereon, of each resident delinquent, and if the taxes and penalty are not paid on such demand, he shall proceed immediately to levy upon sufficient personal property of such delinquent to pay such taxes, penalty and the costs of sale, and to sell the same in the manner and at the place hereinafter provided. In case such delinquent tax and penalty is paid upon demand, such treasurer shall charge and receive from such delinquent, in addition to the taxes and penalty, the sum of twenty-five cents, and where a levy is made he shall charge and receive, in addition to his other costs, the sum of fifty cents for such demand. When he can find no personal property of such delinquent within the county upon which to levy, after diligent search therefor, he shall make opposite the name of said person on said list, in the column marked "return," a special return, setting forth the fact that he had made diligent search in the county for personal property of such delinquent and was unable to find any upon which to levy for the payment of the taxes due thereon, which return shall be *prima facie* evidence of the facts therein recited; and the treasurer shall, if he have reason to believe that such de-

linquent have money, effects or other property in his possession or on deposit that can be reached by any remedy known to the law, make known such facts to the prosecuting attorney, who shall cause such proceedings to be brought as will secure the payment of such delinquency, and for his services in so doing shall receive ten per cent. of such money so collected, and a docket fee of ten dollars to be taxed as costs in such action and paid out of moneys so collected. (Ibidem, Sec. 8571.)

SECTION 169. It shall be the duty of every administrator, executor, guardian, receiver, trustee or person having the property of any decedent, infant, idiot or insane person in charge, to pay the taxes due upon the property of such decedent, ward or party, and in case of his neglecting to pay any installment of taxes when due, when there is money enough on hand to pay the same, the county treasurer shall present to the circuit or other proper court of the county, at its next term thereafter, a brief statement in writing, signed by him as such county treasurer, setting forth the fact and amount of such delinquency, and such court shall at once issue an order directed to such delinquent, commanding him to show cause within five days thereafter why such tax and penalty and costs should not be paid, and upon his failing to show good and sufficient cause for such non-payment, the court shall order him to pay such tax out of the assets in his hands belonging to the estate of such decedent, ward or other person, and such delinquent shall not be entitled to any credit in any settlement of said trust for the penalty, interest and cost occasioned by such delinquency, or by the order to show cause, but the same shall be a personal charge against him, and he shall be liable on his official bond for such penalty, interest and costs. (Ibidem, Sec. 8587.)

SECTION 170. Every executor, administrator, guardian, trustee, receiver or person having the property of another in charge as aforesaid, who shall be put to any personal expense in paying the taxes of the estate of such decedent, ward or other person, by advancing the money therefor, shall be allowed the amount of the same with legal interest up to the time that he is reimbursed from

the funds of such estate, and such advancement shall be deemed in all courts a just charge against the estate of the person or persons for whose benefit the same was advanced. (Ibidem, Sec. 8588.)

SECTION 171. Nothing herein contained shall prevent the county treasurer from levying upon and selling the property of the estate of any decedent or any ward or person whose property is held in trust by another for the payment of any delinquent taxes in the same manner as other property is sold to pay delinquent taxes, and the remedy given to the county treasurers by the provision of this act shall be regarded as only cumulative, but every person holding property either as executor, administrator, guardian or in any other representative or fiduciary capacity, who shall neglect or refuse to pay the taxes listed and due thereon, shall be liable in an action to the heirs of such decedent or to such ward *cestuī que trust*, for any damages sustained by such neglect or refusal. (Ibidem, Sec. 8589.)

SECTION 172. The lien of the state for all taxes for state, county, school, road or township purposes shall attach on all real estate on the first day of April annually, and such lien shall be perpetual for all taxes due from the owner thereof which have heretofore accrued or shall hereafter accrue with the interest and penalty in such case until payment, which lien shall in nowise be affected or destroyed by any sale or transfer of any such real estate. (Ibidem, Sec. 8590.)

SECTION 173. All the property ,both real and personal, situated in any county, shall be liable for the payment of all taxes, penalties, interest and costs charged to the owner thereof in such county, and no partial payment of any such taxes, penalties, interest or costs shall discharge or release any part or portion of such property until the whole is paid; which lien shall in nowise be affected or destroyed by any sale or transfer of any such personal property, and shall attach on the first day of April annually for the taxes of such year. (Ibidem, Sec. 8591.)

SECTION 182. Whenever the county treasurer shall discover or receive credible information, or if he shall have

reason to believe at any time that any of the property, real or personal, or the poll of any person liable to pay tax has not been assessed by the assessor, or that any real or personal property has been omitted in the assessment of any year or number of years from the assessment books or from the tax duplicate, or any person, company or corporation has from any cause omitted to list any part of his, her or their property for any year, or number of years, or has in any year or number of years given a false or incorrect or partial statement of any of the property required by this act to be listed, or that any real property, by reason of defective description thereof, has failed to pay taxes for any year or number of years, or that the tax for which the said property was liable has not been paid, or shall discover before the meeting of the county board of review that any of the assessors have not returned the full value of the assessables of any person required to be listed, or have made any erroneous return of such assessables, he shall report the same forthwith to the county auditor, whose duty it shall be to correct the tax duplicate in his office, and at the same time to correct in like manner the duplicate in the hands of the county treasurer, adding such property or polls thereto, and also adding the assessments and valuation thereon. The county treasurer shall then collect the taxes thereon the same as if they had been assessed by the assessor. All property so assessed shall be rated at its true cash value. As to notice to the person when not present, if residing in the county the treasurer shall be governed by the provisions of the foregoing section in relation to assessors and auditors, but he shall not be required to assess the property upon actual view or to furnish the owner thereof with a blank list. (Ibidem, Sec. 8600.)

SECTION 224. No general or specific tax authorized by the laws of this state, and which shall be assessed on any property in any township, city or town within this state by any officer authorized to make assessments, or which, if made by another person or may be adopted by such officer as his act, shall be held to be illegal or invalid for want of any matter of form in any proceeding not affecting the merit of the case, and which shall not preju-

dice the rights of the party assessed. And all taxes assessed upon any property in this state shall be presumed to be legally assessed until the contrary is affirmatively shown, and no sale of real estate for the non-payment of the taxes thereon shall be rendered invalid by showing that any certificate, return, affidavit or other paper required to be made and filed in any office is not found in any office where the same ought to be filed or found, but until the contrary is proven the presumption shall be in all cases that such certificate, return, affidavit or other paper was properly made and filed in the proper office. (Ibidem, Sec. 8642.)

SECTION 226. The county auditor and treasurer shall attend at the office of said auditor on the third Monday in April annually, and the treasurer shall then and there make a statement with the auditor for the amount of taxes for which such treasurer is to stand charged as follows:

First: The auditor shall, in a column or columns, for the purpose, opposite the name and description on the right hand of the duplicate in the hands of the auditor and treasurer, extend a list of all such taxes as the treasurer shall have been unable to collect.

Second: The treasurer under oath to be administered by the auditor, shall certify in such duplicate to the correctness of such list, setting out in words and in figures the amount thereof.

Third: The treasurer shall immediately proceed to collect the same in the manner provided by law.

Fourth: After deducting the amount of taxes so returned delinquent and the collection fees allowed the treasurer for the several taxes charged on the duplicate, in a just and ratable proportion, the treasurer shall be held liable for the balance.

Fifth: The auditor shall certify in such manner as the auditor of state shall direct the balance due for all state purposes and the balance due for county or other local purposes, which certificate he shall deliver to the treasurer, who shall deliver the same to the auditor of state at the time he makes settlement with him. The said treasurer shall also on the first Monday in November make settlement with the county auditor for the amount of all the tax and delinquent tax for which said treasurer is to stand charged; said settlement in all respects to be made and certified in such manner as the auditor of state shall direct, and it shall be the duty of the county auditor to forward a certified copy of such settlement forthwith to the auditor of state. (Ibidem, Sec. 8644.)

SECTION 227. Each county treasurer shall, on or before the 15th day of May in each year, pay over to the

state treasurer all the moneys found due for all state purposes according to the certificate of settlement with the auditor of his county, and shall take a receipt or receipts for the money so paid, which he shall deposit with the auditor of state, who shall give him a quietus. (Ibidem, Sec. 8645.)

SECTION 228. Each county treasurer shall also, on or before the first day of January of each year, pay over to the state treasurer all the moneys found due for state revenue, school tax and all other state purposes according to the certificate of settlement with the auditor of his county, and shall take a proper receipt or receipts from the treasurer for moneys so paid, which he shall deposit with the auditor of state who shall give him a quietus. (Ibidem, Sec. 8646.)

SECTION 241. Any failure to deliver the treasurer's or assessor's books within the time required by this act, or to make any official certificate within the time required by this act, shall in no way affect the validity of the assessment and levy or collection of taxes, but in case of such failure, the assessment and levy of taxes and the proceedings to collect taxes shall be held to be as valid and building [binding] as if said books had been delivered at or within the time required by law. (Ibidem, Sec. 8659.)

SECTION 253. All liens for taxes, and all penalties, and any right to redeem from tax sales, accrued under former laws, and existing at the time of the passage of this act are hereby continued in force and may be enforced under the provisions of this act, and all suits and proceedings now pending for collection of taxes under former and existing laws, shall be continued to a final determination, the same as if this act had not been passed. (Ibidem, Sec. 8671.)

SECTION 254. Cities shall be governed by the provisions of this law, in regard to the matters embraced therein, so far as the same are applicable, and the duties required by the terms of this act to be done by the county officers, shall be performed by the corresponding officers of each city in regard to the assessment and collection of taxes, and all matters pertaining thereto: *Provided*, That all city taxes shall be paid on or before the third

Monday in April of each year, unless the common council shall, by ordinance or resolution, determine otherwise, as provided by law: *And, provided further*, That the office of city assessor and the city board of equalization are hereby abolished and the assessment of real and personal property, as made and returned by the township assessor, shall serve as the assessment for city purposes, and the proper city officers shall have access to the assessor's books and to the tax duplicates in the county auditor's office, for the purpose of transcribing therefrom a list of the property assessed, as the same shall have been equalized by the board of review and the state board of tax commissioners. (Ibidem, Sec. 8672.)

Supreme Court of the United States.

No. 100.—October Term, 1901.

Edward P. Gallup, Executor of William P. Gallup, deceased, Plaintiff in Error, *vs.* William H. Schmidt, Treasurer of Marion County, Indiana. } In error to the Circuit Court of Marion County, State of Indiana.

[January 6, 1902.]

This is a writ of error to a judgment of the circuit court of Marion County, State of Indiana, entered in pursuance of a final judgment of the Supreme Court of that State, in a case wherein Edward P. Gallup, executor of William P. Gallup, deceased, was plaintiff in error, and William H. Schmidt, treasurer of said Marion County, was defendant in error.

The main facts in the case were thus stated in the opinion of the Supreme Court, (154 Ind. 196):

"William P. Gallup, having for thirty-one years been a resident therein, died, testate, in the city of Indianapolis, Marion County, in December, 1893, the owner and in possession of a large personal estate in said county. The will was duly admitted to probate in the Marion circuit court, and Edward P. Gallup, a resident of the State of New Hampshire, the principal and residuary legatee, was qualified as executor in January, 1894, and March 5, 1894, filed an inventory showing a personal estate of $492,628.26. Subsequently, in the spring of 1894, said executor listed to the assessor for taxation for the year 1894 personal property of the estate aggregating $383,906.46. On January 15, 1895, Taggart, then auditor of Marion County, discovered, on what he believed to be credible information, that a large amount of personal property belonging to and in possession of said decedent had not been listed for taxation for the years 1881 to 1893 inclusive; and, upon that day, acting under section 8560, Burns' R. S. 1894, caused to be served by the sheriff upon Edward P. Gallup, as executor, who was at the time in Indianapolis, engaged in the settlement of said estate, notice in writing of his intention to add such omitted property to the tax duplicate, and requiring such executor to appear before him within five days to show cause, if any, why such property should not be so added. The notice specified the property to be added as county, township, town, and other bonds, notes, mortgages, claims, dues, demands and other credits, money on hand and on deposit.

"January 19, 1895, the executor appeared before the auditor and filed written objections to the authority of the auditor to proceed further, which were overruled. The executor then filed an answer to the notice, and on the 21st day of January, 1895, the auditor issued a subpœna for the executor, requiring him to appear forthwith before him and to bring with him all notes, mortgages and bonds in his possession, as such executor, to testify in said proceeding. The executor appeared on the 24th day of January, 1895, and filed further objections to the jurisdiction of the auditor, which were overruled; and thereupon he was examined under oath.

"Upon consideration of the evidence the auditor found that William P. Gallup, in addition to the property returned by him for taxation, was the owner and in possession of other taxable personal property not listed and not taxed during the several years from 1881 to 1893 specifically stated for each year, and on January 25, 1895, placed the same upon the tax duplicates, and computed and extended taxes thereon for the whole of said period, including statutory penalties and interest, the sum of $61,233.59. After the same was placed upon the duplicate in the treasurer's hands he made demand upon the said executor to pay said additional taxes, but he refused to pay all or any part thereof.

"The executor on the 4th day of January, 1895, filed in the circuit court his final settlement report, and gave notice that the same would be finally heard on the 25th day of January, 1895; and upon the day set for hearing of the report, the same being the next day after the additional assessments had been placed upon the duplicate, Holt, as treasurer of Marion County, filed in said court, under sec. 8587, Burns' R. S. 1894, in the term thereof that was then running, his petition for an order upon the executor to show cause why he should not pay the taxes assessed by the auditor. The order was granted, and on February 9, 1895, the executor appeared and filed his motion to dismiss the said proceedings for the reason that the court had no jurisdiction to proceed to hear the cause, for the reason that the county treasurer was not authorized, under the law, to present said claim to the court at the January term, 1895.

"More than two years afterwards, to wit, December 16, 1897, the court overruled the executor's motion to dismiss; and on June 18, 1898, the executor filed his answer in eight paragraphs. A demurrer to the third fourth and sixth was sustained, and a trial was had before the court upon the issues joined upon the petition, answer of general denial, payment and set off, and, upon a special finding of facts and conclusions of law favorable to the treasurer, judgment was rendered against the executor that he pay to the treasurer on account of said omitted taxes the sum of $46,996.69."

Appeals were taken by both parties from the decree of the circuit court of Marion County to the Supreme Court of the State. That court was of opinion that the executor, as appellant, was not entitled to a reversal, but that, for error of the Circuit Court in allowing the executor a certain credit of $5,750 upon the amount recovered, the judgment must be reversed with instructions to restate conclusions of law in accordance with the opinion of the Supreme Court, and render judgment thereon in favor of the treasurer for the sum of $52,746.69, with interest from October 31, 1898; and final judgment for said amount was accordingly so entered by the circuit court of Marion County, to which judgment a writ of error was allowed and the cause brought to this court.

Mr. Justice SHIRAS delivered the opinion of the Court.

To answer the questions presented to us in this record requires an examination of two sections of the Indiana Revised Statutes, which read as follows:

"SEC. 8560. Whenever the county auditor shall discover or receive credible information, or if he shall have reason to believe that any real or personal property has, from any cause, been omitted in whole or in part in the assessment of any year or number of years, from the assessment book, or from the tax duplicate, he shall proceed to correct the tax duplicate, and add such property thereto, with the proper valuation, and charge such property and the owner thereof with the proper amount of taxes thereon, to enable him to do which he is invested with all the powers of assessor under this act. But before making such correction or addition, if the person claiming to own such property, or occupying it, or in possession thereof, resides in the county and is not present, he shall give such person notice, in writing, of his intention to add such property to the tax duplicate, describing it in general terms, and requiring such person to appear before him at his office at a specified time, within five days after giving such notice, and to show cause, if any, why such property should not be added to the tax duplicate; and if the party so notified does not appear, or if he appears and fails to show any good and sufficient cause why such assessment shall not be made, the same shall be made, and the county auditor shall, in all cases, file in his office a statement of the facts or evidence on which he made such correction; but he shall in no case reduce the amount returned by the assessor, without the written consent of the auditor of state, given on the statement of facts submitted by the county auditor."

"SEC. 8587. It shall be the duty of every administrator, executor, guardian, receiver, trustee or person having the property of any decedent, infant, idiot or insane person in charge, to pay the taxes due upon the property of such decedent, ward or party, and, in case of his neglecting to pay any installment of taxes when due, when there is money enough on hand to pay the same, the county treasurer shall present to the circuit or other proper court of the county, at its next term thereafter, a brief statement in writing, signed by him as such county treasurer, setting forth the fact and amount of such delinquency, and such court shall at once issue an order directed to such delinquent, commanding him to show cause within five days thereafter why such tax and penalty and costs should not be paid, and, upon his failing to show good and sufficient cause for such non-payment, the court shall order him to pay such tax out of the assets in his hands belonging to the estate of said decedent, ward or other person; and such delinquent shall not be entitled to any credit, in any settlement of said trust, for the penalty, interest and cost occasioned by such delinquency, or by the order to show cause, but the same shall be a personal charge against him, and he shall be liable, on his official bond, for such penalty, interest and costs."

Having alleged that he was and during all of his life had been a citizen of the United States, and that at no time during the year 1894 or since has he resided in Marion County, Indiana, but that during said year and ever since he has continually been and still was a resident and citizen of Lebanon, in the State of New Hampshire, Edward P. Gallup claimed, in the courts below, that in section 8560, providing for the assessment of omitted property by the county auditor, no provision whatever is made for notice to any person not a resident of the county in which said omitted

property is proposed to be assessed, but that the sole provision for such notice is to person or persons resident of such county, and that by reason of the premises said statute is in violation of the Fourteenth Amendment to the Constitution of the United States, in that said statute deprived him of his property without due process of law; denied to him the equal protection of the laws; also denies to him, as a citizen of New Hampshire the privileges and immunities enjoyed by a citizen of Marion County Indiana, contrary to the second section of article 4 of the Constitution of the United States; and that said statute is further invalid in that it grants to a class of citizens, namely, residents of the particular county in which the property sought to be assessed is situate, privileges and immunities which, upon the same terms, do not equally belong to all citizens.

This arraignment of the statute is based on the fact that Edward P. Gallup, though acting as executor of William P. Gallup, deceased, in the county of Marion, Indiana, was, at the time he was served with the auditor's notice, not a resident of that county, but was a resident of the State of New Hampshire; and the contention is that, though he received such a notice, yet he was not within the letter of the statute because not a resident of the county in which the property was situated, and therefore the notice actually given him was not a notice in point of law, and the auditor in proceeding with the duties of his office acted without jurisdiction, and that consequently the plaintiff in error has been deprived of his property without due process of law.

The Supreme Court of Indiana disposed of this contention by holding "that Edward P. Gallup was an official resident of Marion County at the time the proceeding by the auditor was begun, and therefore within the express terms of this section."

This construction of the section is criticized by the learned counsel of the plaintiff in error as novel, and unsupported by authority. However this may be, it is a construction or application of the statute to the case in hand and is binding upon us.

It is strongly urged that, whether the view of the Indiana Supreme Court be sound or not, in interpreting the section to cover the case of an official residence, the result is to deprive the plaintiff in error of rights and privileges secured to him by the Constitution of the United States, and numerous cases are cited to the effect that assessments and special burdens upon taxpayers are void unless the law provides for notice, and that notice in fact is not equivalent to notice in law. It is claimed that the plaintiff in error has been afforded no opportunity to be heard, and that, because the section provides for notice to residents of the county, and for no notice whatever to non-residents of the State and county, a case of discriminative legislation is created whereby non-residents are denied the equal protection of the laws.

To these suggestions the Supreme Court of Indiana replied by saying:

"He, Gallup, was in a situation to avail himself of all the rights and privileges he asserts are unjustly denied to non-residents, and, while himself not aggrieved, he will not be permitted to assail a revenue statute on behalf of others who are making no complaint. The courts are open to those only who are injured. . . . Conceding all that appellant affirms concerning his residence and the absence of any provisions in section 8560 for service of notice on non-residents, still he is not in a condition to complain that he has had no day in court. The assessment by the auditor, right or wrong, was not a final judgment. It was only *prima facie* correct. The courts were open to appellant, even though a non-resident, to challenge it by injunction. Failing to thus seek relief against it, the treasurer appealed to the circuit court for an order against him to show cause why he did not pay the taxes. The jurisdiction of the circuit court over its executor will not be controverted, even though his personal residence is in New Hampshire. He was ordered by the court to show cause, if he had any, why he did not pay the taxes. In response to the order any defense he had or ever had was open to him.

"It is no longer an open question in this State that if a party against whose property an assessment has been made is, at any time in the course of the proceeding before a conclusive judgment, afforded by law an opportunity to contest its correctness, he is accorded due process of law."

It has frequently been held by this court, when asked to review tax proceedings in State courts, that due process of law is afforded litigants if they have an opportunity to question the validity or the amount of an assessment or charge before the amount is determined, or at any subsequent proceedings to enforce its collection, or at any time before final judgment is entered. (*Walker* v. *Savenet*, 92 U. S. 90; *Davidson* v. *New Orleans*, 96 U. S. 97; *Spencer* v. *Merchant*, 125 U. S. 345; *Allen* v. *Georgia*, 166 U. S. 138; *Orr* v. *Gilman*, 183 U. S.)

In the present case the plaintiff in error not only had an opportunity to appear and to set up any defense that he may have had, but actually did appear, and, after his demurrers and motion to dismiss had been overruled, answered and was fully heard in the trial court. His objections to the findings and rulings of that court have been heard and considered by the Supreme Court of the State.

The method followed by the auditor in assessing the additional taxes was, perhaps, open to criticism, but was approved by the Circuit and Supreme Courts, and presents no question over which we have jurisdiction.

Failing to see that any rights or privileges secured to the plaintiff in error by the Constitution of the United States have been denied him, we are of opinion that the judgment of the Supreme Court of Indiana must be

Affirmed.